88-1490

No. ____

Supreme Court, U.S.
FILED
MAR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LOCAL LODGE D111 OF THE CEMENT, LIME, GYPSUM AND ALLIED WORKERS, DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO; RONNIE BRANT, Individually and as President of LOCAL LODGE D111; MARSHA PINKNEY, Individually and as Recording Secretary of LOCAL LODGE D111; and FREDDIE STEPHENS, Individually and as Financial Secretary of LOCAL LODGE D111
and
INDEPENDENT WORKERS OF NORTH AMERICA,
Petitioners and Intervenor

v.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Bernard N. Katz*
Robert G. Rothstein
David W. Wolf
Counsel for Petitioners and Intervenor

MERANZE AND KATZ
12th Floor, Lewis Tower Building
15th and Locust Streets
Philadelphia, Pennsylvania 19102
(215) 546-4183
**Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

QUESTIONS PRESENTED

1. Should not the Court grant the writ and decide this case where there is increasing and related nationwide District Court litigation and appeals, and three Courts of Appeals have reached differing interpretations of the identical union constitution and merger contracts construed by the court below?

2. Should not the decision of the court below be reviewed and reversed because, in conflict with federal labor policy, it enforces a contractual forfeiture provision and mandates the forfeiture of all assets and property of a local union held in trust for its members, after members of the local union change the international affiliation of their local union but remain intact as a local union body?

3. Should not the decision of the court below be reviewed and reversed because it conflicts with federal labor policy considerations and NLRB precedent and compels members of an international, who effectively resign from that union in order to become members of a new international, to continue paying per capita taxes and union dues to the former international?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	7
I. THE COURT SHOULD GRANT THE WRIT AND DECIDE THIS CASE BECAUSE THERE IS INCREASING AND RELATED NATIONWIDE DISTRICT COURT LITIGATION AND APPEALS, AND THREE COURTS OF APPEALS HAVE REACHED DIFFERING INTERPRETATIONS OF THE UNION CONSTITUTION AND MERGER AGREEMENT CONSTRUED BY THE COURT BELOW	9
A. An Authoritative Ruling By This Court Is Necessary To Address And Resolve A Conflict Of Interpretation Among The Courts Of Appeals	9
B. The Courts Of Appeals Have Reached Conflicting Interpretations In Construing Whether Or Not The Constitution And Merger Agreement Prohibit Disaffiliation	11
1. The Seventh Circuit Position	11
2. The Third Circuit Position	13
3. The Eleventh Circuit Position	14
C. The Decision Of The Court Below Presents A Broad Interpretation Of Federal Labor Policy Which Is Inconsistent With A Recent Decision Of This Court	15

TABLE OF CONTENTS – *(Continued)*

Page

II. THE DECISION OF THE COURT BELOW SHOULD BE REVIEWED AND REVERSED BECAUSE, IN CONFLICT WITH FEDERAL LABOR POLICY, IT ENFORCES A CONTRACTUAL FORFEITURE OF ALL ASSETS AND PROPERTY OF A LOCAL UNION HELD IN TRUST FOR ITS MEMBERS AFTER MEMBERS OF THE LOCAL UNION CHANGE THE INTERNATIONAL AFFILIATION OF THEIR LOCAL UNION BUT REMAIN INTACT AS A LOCAL UNION BODY..... 17

A. The Principles of Democratic Unionism Are The Hallmark Of Organized Labor..... 17

B. The LMRDA Does Not Permit a Finding of Entitlement to Assets..... 19

C. The IBB's Constitution Does Not Support A Finding of Entitlement to Assets..... 22

D. Forfeiture of Assets Constitutes a Penalty, Thus Impairing Union Members' Right to Resign..... 23

III. THE DECISION AND ORDER OF THE COURT BELOW SHOULD BE REVIEWED AND REVERSED BECAUSE IT CONFLICTS WITH FEDERAL LABOR POLICY CONSIDERATIONS AND NLRB PRECEDENT AND COMPELS MEMBERS OF AN INTERNATIONAL, WHO EFFECTIVELY RESIGN FROM THAT UNION IN ORDER TO BECOME MEMBERS OF A NEW INTERNATIONAL, TO CONTINUE PAYING UNION DUES TO THE FORMER INTERNATIONAL..... 25

A. Supreme Court Precedent Confirms the Right to Voluntarily Resign from a Union Without Penalty..... 25

TABLE OF CONTENTS – *(Continued)*

Page

B. NLRB Precedent Confirms the Right to Voluntarily Resign From a Union Without Penalty 27

C. The IBB's Constitution Precludes a Finding of Continued Obligation for Dues 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: Page

Alvino v. Caraccio, 400 Pa. Super. 477, 162 A.2d 358 (Pa. Sup. Ct. 1960) 21

Automobile Workers v. Wells Mfg. Co., 28 LRRM 2656 (Wisc. Cir. Ct., 1951) 23

Booster Lodge No. 405, Int'l. Ass'n. of Machinists v. NLRB, 412 U.S. 84 (1973) 18, 27, 28

Bradley v. O'Hare, 46 LRRM 2672 (N.Y. Sup. Ct. 1960). 22

Carpenters Local Union No. 1846, v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982) *reh'g. denied* 696 F.2d 996 (5th Cir.), *cert. denied,* 464 U.S. 335 (1983) 17

C.C. Lumber Co., Inc. v. Waterfront Comm'n. of New York Harbor, 292 N.E. 2d 1 (N.Y. 1972) 19

Crawford v. Newman, 11 Misc. 2d 329, 174 N.Y.S. 2d 673 (1958), *aff'd.,* 5 A.D. 2d 859, 172 N.Y.S. 2d 775 (N.Y. App. Div. 1958) 23

Fitzgerald v. Abramson, 89 F.Supp. 504 (S.D. N.Y. 1950) 22

Ford Motor Co. v. NLRB, 441 U.S. 488 28

General Electric Co., 197 N.L.R.B. 608 (1972) 28

Hood v. Journeymen Barbers, Hairdressers, Cosmetologists and Proprietors Int'l. Union, 454 F.2d 1347 (7th Cir. 1972) 19

International Bhd. of Boilermakers v. Local Lodge D30, No. NA 88-1-C (N.D. Ind., Nov. 30, 1988)..... 10, 13

International Bhd. of Boilermakers v. Local Lodge D52, No. CV-88-1136-WJR (JRx) (C.D. Cal., filed Mar. 2, 1988) 10

International Bhd. of Boilermakers v. Local Lodge D129, No. 88-CV-0126 (N.D. N.Y., filed Feb. 4, 1988)..... 10

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

International Bhd. of Boilermakers v. Local Lodge D238, 678 F.Supp. 1575 (M.D. Ga. 1988) 10, 15

International Bhd. of Boilermakers v. Local Lodge D238, No. 88-8150 (11th Cir., Feb. 16, 1989), *petition for reh'g. filed*, (11th Cir. Mar. 7, 1989) 9, 14, 15

International Bhd. of Boilermakers v. Local Lodge D354, No. EV-87-129-C (S.D. Ind., filed Aug. 10, 1987) ... 10

International Bhd. of Boilermakers v. Local Lodge D461, *663 F.Supp. 1031 (M.D. Ga. 1987)* 10

International Bhd. of Boilermakers v. Local Lodge D504, Nos. 88-1379 and 88-1395 (3rd Cir., Feb. 1, 1989), *reh'g. denied*, (3rd Cir., Mar. 1, 1989) 9, 13, 14

International Bhd. of Boilermakers v. Local Lodge 714, 663 F.Supp. 1071 (N.D. Ill., 1987), *vacated and rem.*, 845 F.2d 687 (7th Cir. 1988) *on remand*, 696 F.Supp. 691 (N.D. Ill. 1988) 10, 11, 13-15, 23, 24

International Bhd. of Boilermakers v. Bivens, No. 88-42-3-MAC (M.D. Ga., filed Feb. 23, 1988) 10

International Bhd. of Boilermakers v. Godfrey, No. 87-C-2010-S (N.D. Ala., filed Nov. 13, 1987)..... 10

International Bhd. of Boilermakers v. Miller, No. 1-87-442 (E.D. Tenn., filed Dec. 14, 1987)..... 10

International Bhd. of Boilermakers v. Smith, No. 1-87-CV-2511 CAM (N.D. Ga., Nov. 19, 1987) 10

Louisville Ry. Co., 90 N.L.R.B. 678 (1958)..... 21

Machinists, Local Lodge 1414, 270 N.L.R.B. 1330 (1984)..... 24, 28

Machinists, Local Lodge 2045, 268 N.L.R.B. 635 (1984)..... 24, 28

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Minneapolis Star & Tribune Co., 109 N.L.R.B. 727 (1954) 26

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) 25, 26, 27, 28

NLRB v. Granite State Joint Board, Textile Workers Union Local 1029, 409 U.S. 213 (1972)..... 17, 18, 26, 28

NLRB v. Hershey Chocolate Corp., 297 F.2d 286 (3rd Cir. 1961) 21

NLRB v. Indus. Union of Marine and Shipbuilding Workers, 391 U.S. 418 (1968) 26

NLRB v. Red Arrow Freight Lines, 180 F.2d 585 (5th Cir.) *cert. denied*, 340 U.S. 823 (1950) 17

Pattern Makers League V. NLRB, 473 U.S. 95 (1985).. 18, 27

Phillips v. Osborne, 403 F.2d 826 (9th Cir. 1968) 19

Prudential Ins. Co., 106 N.L.R.B. 237 (1953)..... 21

Sanders v. DeLucia, 266 F.Supp. 852 (S.D.N.Y. 1967) .. 21

Scofield v. NLRB, 394 U.S. 423 (1969)..... 26

Trans World Airlines Inc. v. Independent Federation of Flight Attendants, 57 U.S.L.W. 4283 U.S., Feb. 28, 1989), *rev'g.*, 819 F.2d 839 (8th Cir., 1987) ... 15, 16, 17

U.S. Postal Service, 279 N.L.R.B. 40 (1986)..... 28

UFCW Local 425, 282 N.L.R.B. No. 175, 1987 NLRB, 124 LRRM 1220 (1987)..... 28

Wells v. Waukesha County Marine Bank, 401 N.W. 2d 17, 135 Wis. 2d 519 (1986) 21

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Labor Management Relations Act of 1947
29 U.S.C. §151 *et seq.* 8
29 U.S.C. §157 ..... 2, 24
29 U.S.C. §158 2
29 U.S.C. §158(b)(1) 2, 25, 26
29 U.S.C. §158(b)(1)(A) 17, 28

Labor Management Reporting and Disclosure Act of 1959
29 U.S.C. §401 *et seq.* 8, 19, 20
29 U.S.C. §401(a) 3, 19
29 U.S.C. §462 ..... 3, 12
29 U.S.C. §501(a) 4, 19
29 U.S.C. §501(b) 19, 20

Judicial Code and Judiciary
28 U.S.C. §1254(1) 2

Railway Labor Act
45 U.S.C. §151 *et seq.* 15

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LOCAL LODGE D111 OF THE CEMENT, LIME, GYPSUM AND ALLIED WORKERS, DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO; RONNIE BRANT, Individually and as President of LOCAL LODGE D111; MARSHA PINKNEY, Individually and as Recording Secretary of LOCAL LODGE D111; and FREDDIE STEPHENS, Individually and as Financial Secretary of LOCAL LODGE D111
and
INDEPENDENT WORKERS OF NORTH AMERICA,
Petitioners and Intervenor

v.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Ronnie Brant, Marsha Pinkney, and Freddie Stephens, in their individual capacities, and the Independent Workers of North America, petition for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit, entered November 2, 1988.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Georgia, Savannah Division, No. CV 487-127, is officially reported at 681 F.Supp. 1570 (A18).[1] The opinion of the United States Court of Appeals for the Eleventh Circuit, which affirmed the ruling of the District Court, is officially reported at 858 F.2d 1559 (1988). (A3). The Order of the Court of Appeals denying hearing *in banc* is unreported (A1).

JURISDICTION

The Judgment of the Court of Appeals was entered November 2, 1988. The Order denying rehearing *in banc* was entered December 12, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the Labor Management Relations Act of 1947, 28 U.S.C. §157 (herein "LMRA") provides:

RIGHTS OF EMPLOYEES

> **Sec. 7.** Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(b)(1) of the LMRA, 28 U.S.C. §158, provides:

> (**b**) It shall be an unfair labor practice for a labor organization or its agents —

---

1. References herein to "A" pages are to the Appendix to this Petition.

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

Section 2(a) of the Labor-Management Reporting and Disclosure Act of 1959 (herein "LMRDA"), 29 U.S.C. 401(a), provides:

§401. Congressional declaration of findings, purposes, and policy

(a) Standards for labor-management relations

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargin collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

Section 302 of the LMRDA, 29 U.S.C. §462, provides:

§462. Purposes for establishment of trusteeship

Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or

financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

Section 501(a) of the LMRDA, 29 U.S.C. §501, provides:

> **§501. Fiduciary responsibility of officers of labor organizations**
>
> **(a) Duties of officers; exculpatory provisions and resolutions void**
>
> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

STATEMENT OF THE CASE

This case involves issues and claims that in an increasing mass of nationwide individual District Court actions and appeals have clogged the dockets of the federal judiciary. In the resulting decisions, three Courts of Appeals – the Eleventh, Seventh and Third Circuits – have reached differing interpretations of the same union constitution and merger contracts construed below. Further, a conflict has arisen between the Eleventh and Seventh Circuit with respect to the impact on the continued existence of local unions following the members' pursuit of disaffiliation through conduct similar, if not identical, to the disaffiliation procedures followed by Petitioners in the instant case.

The specific issues of this case raise problems regarding fundamental labor policy concerning the rights of members of a labor union to freely resign without penalty or obligation. The particular question is whether a local union's membership may effectively disaffiliate their local from its International union to become members of a new international without suffering forfeiture penalties and being compelled to pay union dues and transfer to the former international the entirety of their treasury. The operative facts of this case arise out of a merger agreement between the United Cement, Lime, Gypsum and Allied Workers International Union (herein "UCLGAWIU") and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (herein "IBB").

At the time of the merger on April 1, 1984, the UCLGAWIU was comprised of local unions that were financially solvent. These unions brought with them funds comprised of dues checkoff monies collected from their members. The merger agreement states the terms and conditions of the merger and specifically provides that where the merger agreement and the IBB's constitution conflict, the merger agreement shall prevail until the IBB's 1991 Consolidated Convention.[2] [3] To address

---

2. Merger Agreement between the IBB and UCLGAWIU, Preamble. Under the terms of the merger agreement, the UCLGAWIU was to be known as the Cement Division of the IBB. UCLGAWIU local union designations

concerns of UCLGAWIU members and officers that they might be dispossessed of their local union treasuries after merging with the IBB, a provision was added to the merger agreement by which "Each Local Lodge will retain its Local Union Treasury."[4]

As a result of the perceived violations of the merger agreement at the IBB's 1986 Convention, and the widely held belief that internal union democratic controls had been violated, substantial numbers of local unions nationwide, including the local formerly known as D111, made independent decisions to disaffiliate from the IBB.[5]

Consistent with their desire to sever all relationships with the IBB and to continue representational activities more consistent with the behavior desired by the rank and file, members of Local III[6] engaged in valid and lawful disaffiliation proceedings, designed individually and collectively to resign their membership in the IBB. Thereafter, the local union's assets were transferred to the local union affiliate of the IWNA to be held in trust for the benefit of the local membership.[7]

More than five months after the local's disaffiliation from the IBB, Respondent revoked the Charter of Local Lodge D111 for lack of the constitutionally required minimum of ten members. In April, 1987, Respondent commenced its action in

---

would remain part of the newly organized Cement Division of the IBB.

3. The IBB conducts its Consolidated Convention every five years.

4. Local UCLGAWIU unions further were expressly excluded from the merger agreement's provision which provides for assets and properties of the UCLGAWIU and its affiliated District Councils to be transferred to the merged organization. Merger Agreement, *supra,* note 2, Article XXIV (Transfer and Title of Assets).

5. The local unions collectively established a new International labor organization, the Independent Workers of North America (hereinafter "IWNA"), the Intervenor here.

6. Having disaffiliated from the IBB, the local deleted from its name the "D" prefix assigned to it when it as a local affiliate of the UCLGAWIU merged with the IBB.

7. The IWNA was ultimately certified by the National Labor Relations Board as the collective bargaining agent of the employees formerly represented by the IBB pursuant to the Board's certified election conducted January 16, 1987.

Chatham County, Georgia, Superior Court. The complaint alleged the supremacy of the IBB Constitution, the duties of the individual officers, and their alleged breach of the duties for failure to surrender books, records, properties, funds and assets of Local Lodge D111. The complaint was later removed by Petitioner to the United States District Court for the Southern District of Georgia, Savannah Division.

The District Court granted the IBB summary judgment and concluded that the local lodge and hence the international union, not the members or their designated union, were entitled to retain their treasury. Its Order directed the new local union to turn over its treasury to the IBB.

The Court of Appeals affirmed the District Court's grant of summary judgment, finding its conclusions reasonable and finding further the contract (the IBB Constitution and the merger agreement) to be unambiguous and consistent (A16). The effect of the holding below is that union members who opt to affiliate with a new International after disaffiliating from their former International cannot escape the forfeiture of their local union's treasury and must continue to pay dues despite their desires and intentions to sever all relationships with and obligations to their former International as of the date of disaffiliation.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for three reasons. First, the instant case is worthy of a writ of *certiorari* because in several recent decisions, the Courts of Appeals have reached differing interpretations of the union constitution and merger agreement construed in this case by the court below. To insure consistent judicial resolution of issues which affect important and fundamental rights of union members, an authoritative ruling by this Court is necessary in the instant case. Such a ruling will resolve the differing interpretations rendered by the Courts of Appeals and provide guidance to district courts still faced with a plethora of individual actions involving the identical

issues and, for all practical purposes, the identical parties involved in the instant case.

Second, the instant case merits a writ of *certiorari* because the decision of the court below, contrary to and in contravention of federal labor policy, enforces a contractual forfeiture provision contained in an international union's constitution and directs the forfeiture of the entirety of the assets and property of a local union held in trust for its members after the members of the local union change the international affiliation of their local union but remain intact as a local union body. As such, the decision below denigrates principals of democratic unionism which are the hallmark of organized labor and form a key policy underlying the Labor Management Relations Act of 1947, 29 U.S.C. §151, *et seq.* (herein "LMRA") and the Labor-Management Reporting and Disclosure Act of 1959 (herein "LMRDA"), 29 U.S.C. §401, *et seq.* Indeed, the decision below, by working a forfeiture of all of the assets and property of the local union and its members, constitutes an improper penalty impairing a union members' right to resign and chilling union members' voluntary rights of free choice in choosing their bargaining representatives under the Labor Management Relations Act.

Third, the decision of the court below presents a serious inconsistency with both broad federal labor policy considerations – as reflected in a recent decision of this Court – and the decisions of the National Labor Relations Board, because the decision and order of the court below compels members of an international, who effectively resign from that union in order to become members of a new international, to continue paying per capita taxes – in the form of union dues – to the former international. In this fashion, the decision below similarly threatens to undermine the fundamental rights of voluntary unionism and free association and choice guaranteed to union members under the various labor acts.

Acceptance of the Eleventh Circuit decision would have manifold adverse consequences. First, it would leave unsettled questions of interpretation of the contracts at issue that have resulted in differing interpretations by the Courts of Appeals.

Second, it would improperly penalize and chill the democratic rights of free unionism which form a hallmark federal policy underlying the LMRA and LMRDA as reflected in past and recent decisions of this Court, because the decision and order of the court below permits the forfeiture of the assets and property of local unions and their members as a penalty for union members' exercise of their rights of free choice in choosing a bargaining representative. Third, acceptance of the decision below would fail to address the inequity of and the evisceration of union members' free choice rights flowing from the imposition upon such members of an obligation to continue paying union dues to an organization from which those members have voluntarily chosen to sever all relations and affiliations.

I. THE COURT SHOULD GRANT THE WRIT AND DECIDE THIS CASE BECAUSE THERE IS INCREASING AND RELATED NATIONWIDE DISTRICT COURT LITIGATION AND APPEALS, AND THREE COURTS OF APPEALS HAVE REACHED DIFFERING INTERPRETATIONS OF THE UNION CONSTITUTION AND MERGER AGREEMENT CONSTRUED BY THE COURT BELOW.

A. An Authoritative Ruling By This Court Is Necessary To Address And Resolve A Conflict Of Interpretation Among The Courts Of Appeals.

The argument that the constitution of the IBB, even as modified by the merger agreement, prohibits the disaffiliation of local unions from their newly adopted international and requires the loss, by the members of the local union of the entirety of their local union's assets and property, brought into the reach of the IBB by a recent merger, has been addressed on numerous occasions by a host of federal district and appellate courts.[8] The

---

8. *See International Bhd. of Boilermakers v. Local Lodge D238*, No. 88-8150 (11th Cir., Feb. 16, 1989); *International Bhd. of Boilermakers v. Local Lodge D504*, Nos. 88-1379 and 88-1395 (3rd Cir., Feb. 1, 1989), *reh. denied* (3rd. Cir., Mar. 1, 1989); *International Bhd. of Boilermakers v. Local*

resulting appellate decisions reflect a struggle by three Courts of Appeals to interpret documents that control the destiny of the assets and real property – in essence the accumulated savings from members' dues payments – of local unions and their members who choose to exercise their fundamental, statutorily guaranteed rights of democratic unionism, self-representation, and free association and choice. Faced with this weighty issue, three Courts of Appeals have reached differing interpretations with respect to the impact of the IBB constitution and merger agreement in connection with determining to what extent, if any, the union constitution and merger agreement construed by the court below may be read to outright prohibit disaffiliation, or require complete forfeiture of assets upon the voluntary exercise of free choice – disaffiliation – by local unions and their members.

NOTES *(Continued)*

Lodge D111, 858 F.2d 1559 (11th Cir. 1988); *International Bhd. of Boilermakers v. Local Lodge 714*, 845 F.2d 687 (7th Cir. 1988); *International Bhd. of Boilermakers v. Local Lodge D30*, No. NA 88-1-C (N.D. Ind., Nov. 30, 1988); *International Bhd. of Boilermakers v. Local Lodge D238*, 678 F.Supp. 1575 (M.D. Ga. 1988); *International Bhd. of Boilermakers v. Local Lodge D461*, 663 F.Supp. 1031 (M.D. Ga. 1987) and a handful of other reported decisions. Moreover, there are numerous additional actions pending in the district courts between the Boilermakers International and disaffiliated former local lodges. *See*, e.g., *International Bhd. of Boilermakers v. Godfrey*, No. 87-C-2010-S (N.D. Ala., filed Nov. 13, 1987) (seven consolidated actions); *International Bhd. of Boilermakers v. Local Lodge D354*, No. EV-87-129-C (S.D. Ind., filed Aug. 10, 1987); *International Bhd. of Boilermakers v. Local Lodge D129*, No. 88-CV-0126 (N.D. N.Y., filed Feb. 4, 1988); *International Bhd. of Boilermakers v. Bivens*, No. 88-42-3-MAC (M.D. Ga., filed Feb 23, 1988) *International Bhd. of Boilermakers v. Miller*, No. 1-87-442 (E.D. Tenn., filed Dec. 14, 1987); *International Bhd. of Boilermakers v. Smith*, No. 1-87-CV-2511CAM (N.D. Ga., filed Nov. 19, 1987); *International Bhd. of Boilermakers v. Local Lodge D52*, No. CV-88-1136-WJR (JRx) (C.D. Cal., filed Mar. 2, 1988) (three additional unconsolidated companion cases against three other local lodges).

B. The Courts of Appeals Have Reached Conflicting Interpretations In Construing Whether Or Not The Constitution And Merger Agreement Prohibit Disaffiliation.

1. The Seventh Circuit Position.

In *International Bhd. of Boilermakers v. Local Lodge 714,* 663 F.Supp. 1071 (N.D. Ill. 1987), *vacated and rem.,* 845 F.2d 687 (7th Cir. 1988), the Seventh Circuit vacated the district court's grant of a preliminary injunction and remanded an action instituted by the IBB, the Respondent in the instant case, against local lodge 714, which, like local lodge D111 in the case below, took steps to disaffiliate from the plaintiff international. The district court had granted a preliminary injunction enforcing a trusteeship imposed by the international which had taken control of the skeleton of local lodge 714, purportedly under the terms of the international's constitution. *International Bhd. of Boilermakers v. Local Lodge 714,* 845 F.2d at 691.

The Seventh Circuit vacated the district court decision and order granting the preliminary injunction because the Seventh Circuit interpreted the constitution and merger agreement — the contracts underlying the instant case — to require the disbanding of the local union in the event that the membership of the local union fell below a level of ten members. The Seventh Circuit agreed with the defendants' argument that such a disbanding might have rendered the district court's enforcement of the trusteeship imposed by the IBB over the local union erroneous as a matter of law, under the rationale that a trusteeship cannot be imposed on a disbanded nonexistent entity, and found that there accordingly could be "a grave question whether the trusteeship was authorized by the constitution". *Id.* at 692.

Significantly, in construing the same constitution and merger agreement construed by the court below in the instant case, the Seventh Circuit found that "[t]he international's constitution is ambiguous on the right to disaffiliate." *Id.,* 845 F.2d 692. The court went on to observe that "[t]he question of who gets a local union's assets when the local breaks away is wonderfully tangled" and that "at least in the first instance it is

a matter of contract; in the second instance equitable factors may come in to play, especially in cases where the parent union expelled the local but this is not such a case." *Id.* at 695 (citation omitted).

In addressing this "wonderfully tangled" question, the Seventh Circuit, as noted, remanded the matter to the district court to consider – and if necessary receive further evidence on – the issue of whether the local lodge's membership had dipped below ten members and, if so, whether as a result the local was automatically disbanded and thus no longer an existing entity upon which the IBB could properly impose a trusteeship. The Seventh Circuit further focused and supported its remand on the necessity for further inquiry by the district court on the question of whether there existed an anticompetitive and improper purpose behind the IBB's imposition of a trusteeship. *Id.* at 694-95. The court did so because it found that the IBB's purposes in imposing the trusteeship might not be a legitimate objective as required under Section 302 of the LMRDA, 29 U.S.C. §462, which is the statutory provision authorizing such trusteeships. *Id.* at 692-94. The Seventh Circuit ruled that the district court erred in refusing "to allow the defendants to present evidence that the imposition of the trusteeship was part of a campaign by the international union to prevent its locals from breaking away and affiliating with [the IWNA]," *Id.* at 694. In support of this holding, the court reasoned that in light of the locals' argument that the IBB's objective was "nothing more edifying than a desire to weaken or destroy a rival," such evidence was germane to the issue of whether under Section 302 of the LMRDA the trusteeship was "consistent with the *legitimate* objectives of the International Boilermakers' union." *Id.* at 694 (emphasis in original).

On remand the district court ruled that the signing of a disaffiliation petition by all but five of local 714's members was "alone sufficient to trigger resignation" from the IBB, even without considering further evidence of a vote held among local lodge 714's members, where a majority voted to reaffirm the

disaffiliation petition and the written revocation of dues authorizations in favor of the Boilermakers' International. *International Bhd. of Boilermakers v. Local Lodge 714,* 696 F.Supp. 391, 393 (N.D. Ill., 1988). Because the district court on remand found that the local had ceased to exist and found the trusteeship invalid on that ground,[9] the district court did not reach the issue of the legitimacy of the IBB's purposes under Section 302 of the LMRDA in imposing the trusteeship over local lodge 714.

In sum, the Seventh Circuit's decision in *Local Lodge 714* is significant because the Seventh Circuit there construed the constitution of the IBB to be "ambiguous on the right to disaffiliate". Further, the Seventh Circuit decision is important because it raised the question whether the purposes behind the IBB's imposition of the trusteeships are "legitimate" pursuant to Section 302 of the LMRDA but, because of the nature of the district court's disposition of the case on remand, never resulted in a finding and has left this issue open.[10]

2. The Third Circuit Position.

In *International Bhd. of Boilermakers v. Local Lodge D504,* Nos. 88-1379 and 88-1395 (3rd Cir., Feb. 1, 1989), *reh. denied,* (3rd Cir., Mar. 1, 1989), the Third Circuit reversed the district court's decision which permitted six defendant local unions in a consolidated action to retain their treasuries after disaffiliation from the IBB, *Id., slip op.* at 16. In reaching this holding, the Third Circuit, in apparent conflict with the holding of the Seventh Circuit, ruled that the IBB's constitution, even

---

9. *See also International Bhd. of Boilermakers v. Local Lodge D30,* No. NA-88-1-C (N.D. Ind., Nov. 30, 1988) (after trial on merits, court follows Seventh Circuit decision in *Local 714* and enters judgment for defendants in trusteeship a action, like the instant case, instituted by the Respondent international).

10. The decision of the Seventh Circuit was for practical and strategic purposes favorable to the defendants, and no appeal was taken, or properly should have been taken, from the Seventh Circuit's decision. This open issue, although one which implicitly underlies the decision and order of the court below, has not been, but should be, specifically addressed.

when construed in concert with the merger agreement, "prohibits disaffiliation" *Id., slip op.* at p. 8 n.8. This reading of the IBB's constitution and merger agreement differs from the Seventh Circuits' articulated construction that the constitution is "ambiguous on the right to disaffiliate". *International Bhd. of Boilermakers v. Local Lodge 714,* 845 F.2d at 692. In support of its interpretation of the documents at issue and in reaching its holding, the Third Circuit relied heavily on the reasoning of the Eleventh Circuit in the decision below. *See Local Lodge D504., slip op.* at 13-14.

3. The Eleventh Circuit Position.

In the decision below, the Eleventh Circuit ruled that the constitution and merger agreement require the forfeiture of all of a local unions' assets and property – including real property (*i.e.* the union hall) – upon the voluntary disaffiliation of the local union and its members from the IBB. (A-). The court below thus implicitly read the constitution to prohibit disaffiliation through application of the dual penalties of asset forfeiture and the forfeiture and compelled transfer of voluntary dues payments – made by the local union members to their new international affiliate *following* their disaffiliation activities – back to the old, cast off IBB international union. This extreme penalization of the local union members and the resulting impairment of the free exercise of their rights of democratic unionism clearly constitutes an implicit but practical finding that the union constitution prohibits disaffiliation. Surely, the right to disaffiliate rings hollow and is a right in form only, and certainly not in substance, if concomitant with the exercise of that "right", the affected members are stripped not only of their local union's entire accumulated assets, but also even future, ongoing dues payments. Viewed in this light, the decision of the court below stands in conflict with the decision of the Seventh Circuit, which ruled that the union constitution did not unambiguously prohibit disaffiliation.

The decision below has been followed by a more recent decision of the Eleventh Circuit, *International Bhd. of Boilermakers v. Local Lodge D238,* No. 88-8150 (11th Cir., filed Feb.

16, 1989), which affirmed the district court's grant of a preliminary injunction enforcing a trusteeship imposed by the IBB upon a local lodge. Contrary to the Seventh Circuit's holding in *Local Lodge 714* and the decision of the district court there on remand which found that the signing of a disaffiliation petition by the local's members was *alone* sufficient to trigger resignation of the members and the disbanding of the local, *see International Bhd. of Boilermakers v. Local Lodge 714,* 696 F.Supp. 391, 393 (N.D. Ill., 1988), the Eleventh Circuit held in *Local Lodge D238* that similar, if not identical, steps taken by the members of the local to disaffiliate from the IBB "did not disband the local upon the disaffiliation vote . . . [but] [r]ather, the local lodges continued to function with more than then members". *Local Lodge D238, slip op.* at p. 1418.

Further, although the Eleventh Circuit made no express reference to any disaffiliation petitions of the type relied on by the Seventh Circuit and the district court in *Local Lodge 714,* the district court's opinion below in *Local Lodge D238* does advert to the existence of such petitions. *See International Bhd. of Boilermakers v. Local Lodge D238,* 678 F.Supp. 1575, 1577 (M.D. Ga. 1988). Thus, the Seventh and Eleventh Circuits have reached expressly conflicting conclusions with respect to the issue of the continuity of a local lodge's existence following the members' pursuit of disaffiliation through conduct, similar, if not identical, to the actions taken by the local lodge members in the instant case.

C. The Decision Of The Court Below Presents A Broad Interpretation Of Federal Labor Policy Which Is Inconsistent With A Recent Decision Of This Court.

In *Trans World Airlines Inc. v. Independent Federation of Flight Attendants,* 57 U.S.L.W. 4283 (U.S., Feb. 28, 1989), *rev'g.,* 819 F.2d 839 (8th Cir., 1987), this Court reversed the lower court's decision and held that an employer was not required to lay off junior employees who had crossed picket lines in order to reinstate more senior full-term striking employees at the conclusion of a strike. The case arose under the Railway Labor Act (RLA), 44 Stat. 557, as amended, 45 U.S.C. §151, *et*

seq., but was decided by the Court based on its judicial interpretation of the LMRA. *Trans World Airlines, v. Independent Federation of Flight Attendants,* 57 U.S.L.W. at 4285. The Court's decision reflects an interpretation of federal labor policy and the LMRA which permits union members – there, the "crossover" employees who voluntarily abandoned their union and its picket line in favor of continuing their employment despite their union's collective determination to engage in a strike action – to voluntarily choose to individually free themselves without penalty from the grasp of and regimen and order of rights and obligations flowing from collective bargaining agreements. *Id.*, 57 U.S.L.W. at 4286. In *Trans World Airlines,* the Court endorsed the view that the "crossover" employees, despite having less seniority under the collective bargaining agreement than more-senior returning strikers, nevertheless enjoyed a superior right to maintain their employment after the strike ended. *Id.*

Accordingly, the Court's decision in *Trans World Airlines* supports and reflects an interpretation of federal labor policy and the LMRA which fosters the unimpaired exercise of voluntary individual free choice and the right of self-representation. This policy favoring the voluntary and unimpaired free exercise of individual representational decisions is contravened by the decision of the court below, which requires the complete forfeiture of assets and property and the continued payment of union dues to an organization from which individual union members have *en-masse,* and as a local union body, voluntary chosen to sever all relations and affiliation. In short, the decision below penalizes the exercise of individual's exercise of free choice in making representational decisions and thus conflicts with the policies favoring free choice which underly and are intertwined with this Court's recent holding in *Trans World Airlines.*

The Court should grant the writ to address both the difference among the Circuits with respect to the construction of the constitution and merger agreement at issue in the instant case, and the conflict between the decision below and broad considerations of federal labor policy as reflected by both this

Court's recent decision in *Trans World Airlines* and a series of earlier cases. *See, e.g., NLRB v. Granite State Joint Board, Textile Workers Union of America Local 1029,* 409 U.S. 213 (1972) (herein *"Granite State"*) (after dissolution of union membership, former union member is no longer subject to union's control) *and* cases cited therein.

II. THE DECISION OF THE COURT BELOW SHOULD BE REVIEWED AND REVERSED BECAUSE, IN CONFLICT WITH FEDERAL LABOR POLICY, IT ENFORCES A CONTRACTUAL FORFEITURE PROVISION AND MANDATES THE FORFEITURE OF ALL ASSETS AND PROPERTY OF A LOCAL UNION HELD IN TRUST FOR ITS MEMBERS AFTER MEMBERS OF THE LOCAL UNION CHANGE THE INTERNATIONAL AFFILIATION OF THEIR LOCAL UNION BUT REMAIN INTACT AS A LOCAL UNION BODY.

A. The Principles of Democratic Unionism are the Hallmark of Organized Labor.

The decision of the court below contravenes the LMRA's policy of consensual unionism, embodied in provisions which confer upon employees the right of self organization and choice of collective bargaining representative, free from influence by labor unions. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982) *reh'g denied* 696 F.2d 996 (5th Cir. 1983), *cert. denied,* 464 U.S. 335 (1983); *accord NLRB v. Red Arrow Freight Lines,* 180 F.2d 585 (5th Cir.), *cert. denied,* 340 U.S. 823 (1950).

The general rights of Section 7 of the LMRA to self-organization and to select representatives of employees' own choosing without interference by a labor organization is implemented by Section 8(b)(1)(A), 29 U.S.C. §158(b)(1)(A), making it an unfair labor practice for a union to restrain or coerce employees in the exercise of their Section 7 rights.

It is then a corollary that the right of union members to resign their membership in their union should be equally recognized and protected. This Court outlined the right of a

union member to resign in *Pattern Makers League v. NLRB,* 473 U.S. 95 (1985). The Court quoted from earlier decisions ". . . that when a union constitution does not purport to restrict the right to resign, the 'law which normally is reflected in our free institutions' is applicable." 473 U.S. at 112, citing *Granite State, supra, and Booster Lodge No. 405, Int'l. Ass'n. of Machinists v. NLRB,* 412 U.S. 84 (1973). The Court in *Pattern Makers League, supra,* confirmed that the *Granite State* and *Machinists* decisions, ". . . held only that in the absence of restrictions on the right to resign, members are free to leave the union at any time." The decisions ". . . did not state that the validity of restrictions on the right to resign should be determined with reference to common law." 473 U.S. at 113.

The practical impact of the disposition by the court below of the Respondent's claim to the local union's assets and properties render the union members' otherwise unfettered right to resign contingent upon forfeiture of all monies that were paid by them into the local union's treasury and their continued obligation to their former international to make per capita tax payments.[11] If it is true that once a union member lawfully resigns, ". . . the union has no more control over the former member than it has over the man in the street," *Granite State,* 409 U.S. at 217, it would appear that the IBB's claims are being accorded an inordinate, and impermissible, amount of weight by the court below. The Respondent's failure to recognize the lawful disaffiliations of the individual members, and the lower court's making the resignation of union members from a local union affiliate that has dissolved for lack of membership conditional upon forfeiture of the local union treasury, is a powerful deterrent to any present union member whose local is considering a change of affiliation. If allowed to stand, the lower court's ruling will directly conflict with the overriding policy of consensual unionism implicit and embedded in the federal labor policy scheme.

---

11. The IBB's Constitution expressly recognizes termination of membership only for expulsion, suspension, or obtaining and holding a Withdrawal Card. Article XXVI, Section 5, Termination of Membership Rights.

B. The LMRDA Does Not Permit a Finding of Entitlement to Assets.

The decision of the court below is further inconsistent with and frustrates the policy of the LMRDA. The Congressional declaration of findings, purposes, and policy finds it to continue to be the responsibility of the Federal Government to, *inter alia,* protect employees' rights to choose their own representatives and to otherwise engage in concerted activities for their mutual aid or protection. 29 U.S.C. §401(a).

One of the safeguards established for labor organizations and their members is directed to the responsibility of local officers with whom are entrusted the monies, properties, assets, and operating functions of a local union entity. *See* 29 U.S.C. §501(a). The purpose of that section is to address the misuse or conversion of union funds and property by union officials in order to protect rank and file union members from those leaders who would utilize their positions of trust and confidence to subvert union democracy and the interests of the union's members for personal gain. *Phillips v. Osborne,* 403 F.2d 826 (9th Cir. 1968); *accord, Hood v. Journeymen Barbers, Hairdressers, Cosmetologists and Proprietors Int'l. Union,* 454 F.2d 1347 (7th Cir. 1972); *C.C. Lumber Co., Inc. v. Waterfront Comm'n of New York Harbor,* 292 N.E. 2d 1 (N.Y. 1972). In the case *sub judice*, there was no evidence of conversion or misuse of funds nor was there any suggestion of impropriety. Members signed cards expressly revoking their dues authorizations in favor of the IBB, and instead authorizing their employer to check off dues in favor of their new IWNA local. The resolution and petition expressly authorized and in fact mandated the local union officers to transfer union assets to protect them from the IBB. The local union officers then acted in accordance with the local union membership's individual and uncoerced decisions to disaffiliate from the IBB and to transfer and hold in trust for the members the assets of the local.

Importantly, no individual members of the local availed themselves of the remedies provided in 29 U.S.C. §501(b) to seek a reversal of the officers' actions. Far from a furtive,

secretive act intended to benefit the leadership, the transfer of assets was deliberated and dutifully executed by the local's officers.[12] Upon disaffiliation and again in accordance with the local's membership, the officers resigned membership in the IBB and became members and officers in Local Union 111 of the IWNA. The local remained in existence, represented the same employees, was led by the same officers, and continued in its identity as the collective bargaining representative for the rank and file membership. Membership meetings were held, employer meetings were held, disbursements for Local 111 of the IWNA were made and receipts of union dues, voluntarily paid by the members, were collected. In all instances the officers acted with the same confidence of the support of the membership that they had previously enjoyed.

To let stand the decision of the court below and allow the local's treasury to be forfeited will permit the IBB to obtain by judicial fiat that relief which it has no standing to assert a claim pursuant to the LMRDA. It further will expose to Section 501(b) liability those officers who act in accordance with the wishes of their members. The decision of the court below, if not reversed, would lend judicial imprimatur to a forfeiture, after only a 30 month association with the IBB, of trust monies and assets that have been carefully acquired, dutifully maintained, zealously safeguarded, and properly administered by local union officers acting in the course and scope of their duties since 1940. Ignoring momentarily the judicial abhorence of forfeitures, *infra,* the result effected by the decision of the court below will be to chill forever the congressionally conferred rights not only to choose bargaining representatives, but to take steps necessary to secure a decision to change bargaining representatives.

---

12. The IBB's representatives were well aware of the movement by several former Cement Division locals to disaffiliate from the IBB and to affiliate with the IWNA. The IWNA was incepted in part by former IBB officers and representatives who appeared on the losing ticket at the IBB's 1986 Consolidated Convention. Further, the disaffiliation movement was generally known in the labor community.

Federal and state courts and the NLRB all have considered unions' constitutional provisions requiring forfeitures of local union assets and/or property, and all have found them to be unenforceable. *See, e.g., NLRB v. Hershey Chocolate Corp.*, 297 F.2d 286 (3d Cir. 1961); *Sanders v. DeLucia, 266 F. Supp. 852 (S.D. N.Y. 1967); Prudential Ins. Co.*, 106 N.L.R.B. 237 (1953); *Louisville Ry. Co.*, 90 N.L.R.B. No. 678 (1950); *Wells v. Waukesha County Marine Bank*, 401 N.W. 2d 17, 135 Wis. 2d 519 (Wis. Ct. App. 1986); *Alvino v. Caraccio*, 400 Pa. Super. 477, 162 A.2d 358 (Pa. Sup. Ct. 1960). The Third Circuit, in *Hershey, supra,* reviewed a resolution transferring all property and contract rights of a local affiliate with another. The resolution contained a provision which, following a membership vote, had disaffiliated from its international and affiliated with another international. Dues checkoffs in favor of the new international were executed and the union there, as here, retained all extant officers as officers of the new local. That court held that the local continued as a viable entity, " . . . repudiating in its stride the old international, and without breaking a step, taking on a new [affiliation with the new] International." 297 F.2d at 291. The court sanctioned as property and contract rights the transfer of dues checkoffs to the new International. The same result should be followed here with regard to a local union's assets and treasury where there similarly has been a *bona fide* disaffiliation.

The *Wells* case, *supra,* involves factual circumstances similar to the instant case. The *Wells* court held that not only does a local union have a right to have meetings on disaffiliation and to disaffiliate from an international union, but that the disaffiliated local is not required to forfeit its local treasury even in the presence of the international's constitutional provision requiring such forfeiture. Although *Wells* involved a public employer, the opinion indicates that the decision is equally applicable to private employment situations.

The Court in *Alvino v. Carraccio, supra,* held that the expulsion of the Bakery and Confectionary Workers from the AFL-CIO served to frustrate the purpose of that international's constitution. The locals, therefore, had a right not only to disaffiliate but to retain their assets.

C. The IBB's Constitution Does Not Support A Finding of Entitlement to Assets.

The IBB constitution contains a forfeiture provision[13] that requires forfeiture of all funds to the IBB's International Secretary-Treasurer and transfer of all real property to the International Board of Trustees,[14] with subsequent sale and/or liquidation authorized. Ironically that same provisions' preamble states that "[t]he funds and property of a subordinate body are trust funds for the benefit of its members. . . ."[15] It is the juxtaposition of these constitutional provisions, and the Court's apparent disregard of the preamble that illustrates the compound error by the court below, because the membership, individually, is the beneficial owner of the local's assets.

A reading of the court's decision in *Fitzgerald v. Abramson,* 89 F.Supp. 504 (S.D. N.Y. 1950), interestingly expanded upon by a New York state court in *Bradley v. O'Hare,* 46 LRRM 2672 (N.Y. Sup.Ct. 1960) suggests three factors to be considered in determining the situs of beneficial assets held by a disaffiliating local union. Those considerations are (1) the beneficial owners of the assets are the worker-members, and the international or local holds the assets only as a fiduciary; (2) the right of either entity to perform this fiduciary role may be forfeited by a fundamental and widespread breach of its fiduciary obligations; and (3) in such event, the proper recipient of the assets depends upon what assets are involved, their source, the purpose for which they were committed, the past relationship between the international and the local with respect to financial matters, and the extent to which the local has functioned as an autonomous unit. Thus, if a local is more than a dues-collecting agency for the international, and is itself a self-sufficient organization, the local is regarded as an autonomous unit and entitled to the funds. 46

---

13. Constitution of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CFL, Article XXXV (Miscellaneous), Section 2 (Title to Funds and Property).

14. The Article provides for a penalty of up to 50 percent of a local's assets in the event the local is rechartered.

15. Supra. note 13 at lines 1-2.

LRRM at 2678, citing *Crawford v. Newman,* 174 N.Y.S. 2d 673, *aff'd.* 5 A.D. 2d 859 (N.Y. App. Div. 1958).

In another state case involving disaffiliation, title to assets held by an unincorporated association was held not vested in the 'entity' but rather in the form of undivided interests in the members. *Automobile Workers v. Wells Mfg. Co.,* 28 LRRM 2656 (Wisc. Cir. Ct., 1951). Dues checkoff funds were there recognized as trust funds for union members, who had a right to change affiliation in the middle of a contract period and to compel the employer to hold in trust for benefit of the union members the dues checkoff monies that it refused to turn over to the new local after receiving notice of its disaffiliation.

In the instant case, the membership unwaveringly expressed its desire to sever their relationship with the IBB, executed a resolution and petition for disaffiliation from the IBB, subsequently voted for disaffiliation, executed dues checkoff revocations, and appointed the IWNA as their authorized collective bargaining agent. "No clearer expression of resignation from [the IBB] is required. *International Bhd. of Boilermakers v. Local Lodge 714,* 696 F.Supp. at 393.

The assets involved herein are derived from membership dues, which are deducted from members' wages. They reflect monies entrusted to the local officers on their behalf for their use and benefit in the continued operation of the local. The assets further are clearly necessary to enable the local to engage in its representational duties for the benefit of the membership. Any forfeiture of assets that otherwise would help to underwrite these legitimate and protected activities of a labor organization would frustrate the overriding policy and intent of the LMRA to promote collective bargaining activities and industrial stability.

D. Forfeiture of Assets Constitutes a Penalty, Thus Impairing Union Members' Right To Resign.

The courts and the NLRB have consistently held that a union member is free to resign membership in a local union, and that a union's constitution or bylaws containing restraints on members' rights violate the LMRA. The NLRB has ordered as

an appropriate remedy the expunging of constitutional provisions restricting resignations from membership. *See, e.g, Machinists, Local Lodge 1414,* 270 N.L.R.B. 1330 (1984); *Machinists, Local 2045,* 268 N.L.R.B. 635 (1984). If a local union's treasury is wholly forfeited to an International that the membership voluntarily chooses to resign from, the local union members' right to resign is vitiated. The members' otherwise inalienable right of resignation is burdened with the loss of their entire financial base and means of collective bargaining support. Although the ability of a local union to disaffiliate and join another union facilitates competition among unions, *International Bhd. of Boilermakers v. Local Lodge 714,* 845 F.2d at 694, the members' rights to disaffiliate must be reconciled with their statutory rights to choose a collective bargaining representative and enjoy all that choice has to offer.[16]

Where their selection of a different collective representative accompanies a continuity in all facets of the collective organization, yet they are denied the funding for activities traditionally performed by and commonly expected of labor unions, members cannot be regarded as having the right to resign. As keenly observed by Judge Posner, "The issue of the legitimacy of secession is bound up with the right to the assets . . ." *International Bhd. of Boilermakers v. Local Lodge 714,* 845 F.2d at 694. Contingent though one may be upon the other, federal labor policy and implementing statutes require their bifurcation, so that the issue of legitimacy of secession truly is contingent upon the congressionally conferred right, in 29 U.S.C. §157, to join a labor organization.

---

16. The clear and unambiguous language of the merger agreement, acknowledged by the Court below and intended by the members, reads, in part: "Each Local Lodge will retain its Local Union treasury." Merger Agreement, *supra,* note 2, Article V, Section 3.

III. THE DECISION AND ORDER OF THE COURT BELOW SHOULD BE REVIEWED AND REVERSED BECAUSE IT CONFLICTS WITH FEDERAL LABOR POLICY CONSIDERATIONS AND NLRB PRECEDENT AND COMPELS MEMBERS OF AN INTERNATIONAL, WHO EFFECTIVELY RESIGN FROM THAT UNION IN ORDER TO BECOME MEMBERS OF A NEW INTERNATIONAL, TO CONTINUE PAYING UNION DUES TO THE FORMER INTERNATIONAL.

This Court on five occasions has addressed the ability of a union to restrict its members' efforts to resign. These earlier examinations have focused on a union's ability to enforce its rules against member and nonmember employees within the confines of Section 8(b)(1) of the LMRA. None of the opinions expressly address a union's authority to restrict resignations; and more importantly, none address a union's purported right to impose its constitutional provisions on employees who have resigned. This Court is being asked to review this case in order to resolve a fundamental conflict that exists between decisions of this Court and the federal labor policy scheme, and the decision of the court below in determining the continuing obligation, if any, of union members under an International's constitution to make dues payments after effective resignation from that union.

A. Supreme Court Precedent Confirms the Right to Voluntarily Resign from a Union Without Penalty.

In the first of the more recent decisions of this Court addressing restrictions on resignations, this Court held, in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), that a union can discipline its full members for returning to work during a strike, concluding that if the discipline imposed meets the definitions of an "internal" action, it does not constitute "restraint and coercion," within the meaning of Section 8(b)(1), of rights guaranteed to employees by Section 7 of the LMRA. 388 U.S. at 195. In so holding, the Court essentially accepted the position of the NLRB set out in *Minneapolis Star & Tribune Co.*, 109 N.L.R.B. 727 (1954). Justice White, concurring,

opined that the majority opinion " . . . is the more persuasive and sensible construction of the statute . . ." considering the Court's unanimity in upholding the rule against crossing picket lines during a strike and its enforceability by expulsion from membership. 388 U.S. at 199. Justice White, however expressed his doubts about the implications of some of the majority opinion's generalized statements. 388 U.S. at 198-199.

This Court's *Allis Chalmers* analysis was refined in *Scofield v. NLRB,* 394 U.S. 423 (1969). Following the distinction reached by the Board and affirmed in *NLRB v. Indus. Union of Marine & Shipbuilding Workers,* 391 U.S. 418 (1968), the Court in *Scofield* articulated the appropriate test for evaluating the lawfulness of a union's rule and its enforcement. The Court thus held:

> §8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy congress has embedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. 394 U.S. at 430.

The Court found further that after a member resigns from the union, the union's power over him ends, noting further that if a union rule ". . . invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating §8(b)(1)." *Id.* at 423.

This Court commented on its *Scofield* decision in *Granite State, supra. The Court observed that:*

> [T]he Scofield case indicates that the power of the union over the member is certainly no greater than the union member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member

> relation, the union has no more control over the former member than it has over the man in the street. 409 U.S. 213 at 217.

The Court expressly did not decide to what extent the contractual relationship between union and member may curtail the freedom to resign. *Id.* However, it reiterated the *Scofield* test and found that the union rule, although adopted properly and reflective of a legitimate union interest, was unlawful because the discipline imposed for violation impaired the principle of Section 7, conferring on employees the right to refrain from any or all concerted activities.

This Court followed and applied its reasoning of *Granite State* in *Booster Lodge No. 405, Int'l. Ass'n. of Machinists v. NLRB, Supra.* Again the Court refused to find that the international union's constitution could extend its sanctions to nonmembers or that its sanctions were consistent with the LMRA. 412 U.S. at 89. Since *Scofield* provides that union discipline is lawful only if the members are free to leave the union and escape the rule, the discipline in *Granite State* violated the LMRA because the employees had resigned, thereby placing themselves beyond the union's otherwise legitimate sphere of authority. Importantly the union constitutions in *Booster Lodge* and *Granite State* were silent, as is the IBB's constitution here, on the subject of voluntary resignation from the union. The Court followed its rationale in *Pattern Makers League, supra,* finding that a union may not fine employees who attempted to resign even when resignations are prohibited by the union's constitution.

B. NLRB Precedent Confirms the Right to Voluntarily Resign From a Union Without Penalty.

The Board has the primary responsibility for applying ". . . 'the general provisions of the Act to the complexities of industrial life.' " *Pattern Makers League, supra,* 473 U.S. at 114 (citations omitted). Where the Board's construction of the Act is reasonable, however, it should not be rejected ". . . merely because the courts prefer another view of the statute." *Id.,*

quoting *Ford Motor Co. v. NLRB,* 441 U.S. 488 at 497. In this case, the lower court's decision should be reversed because required payment of dues after resignation from a labor union is a penalty for the otherwise free choice of resigning, and further because this Court has deferred to Board decisions determining whether fines imposed by a union restrain or coerce employees.[17] The NLRB has subsequently followed the reasoning of this Court. *See, e.g., Machinists, Local Lodge 1414, supra,* and *Machinists, Local 2045, supra.* Because the Board has consistently construed §8(b)(1)(A) to prohibit the imposition of fines on employees who have resigned where such resignations are invalid under the union's constitution, *see e.g., General Electric Co.,* 197 N.L.R.B. 608 (1972), this Court should extend its deference to the Board's decisions in these former cases where a union's constitution is silent on the subject of voluntary resignation. *Pattern Makers League,* 473 U.S. at 115. *Booster Lodge No. 405,* 412 U.S. at 88.

C. The IBB's Constitution Precludes a Finding of Continued Obligation for Dues.

Under the IBB constitution a local union is required to pay, from dues received from its members, a per capita tax to the international. Because the payment of dues is the *quid pro quo* for union membership, *U.S. Postal Service,* 279 N.L.R.B. 40 (1986), it necessarily follows that where there is no dues payment there can be no membership in the union, and hence no obligation of the local to pay per capita tax. *UFCW Local 425,* 282 N.L.R.B. No. 175, 1987 NLRB, 124 LRRM 1220 (1987). This conclusion is illustrated where, as here, the IBB's own constitution contains a provision automatically suspending from membership any member who for two calendar months allows his monthly dues to become in arrears. It would be disingenuous to require the payment of per capita taxes to the IBB after it is conceded by the IBB and found by the court below that the local

---

17. See *NLRB v. Allis-Chalmers, Scofield v. NLRB, Booster Lodge No. 405, International Association of Machinists v. NLRB, and NLRB v. Granite State,* all *supra.* Each decision essentially accepted and affirmed the position of the NLRB. *Scofield v. NLRB,* 394 U.S. 423 at 428.

lodge whose obligation it is for such payment has been disbanded for lack of active union membership in accordance with the IBB's constitution. *International Bhd. of Boilermakers v. Local Lodge D111* (A5). To attempt to impose the obligation of the dissolved local lodge upon its former members is not supported by law. Similarly unsupported is any interpretation of the Order of the court below that would transfer the per capita tax obligations of the former local lodge to the local union affiliated with another international. An employee who consciously and deliberately votes to resign his membership from the IBB simply cannot be held captive and compelled to continue paying dues, particularly where their vote evidences an intent to sever all ties with and to no longer be represented by the IBB. The rejected international may attempt to enforce a valid union security clause in a collective bargaining agreement or collect arrearages upon attempted reinstatement. Absent these two remedies, there is no procedure to obligate further payment of dues after resignation from the union, and any attempt to impose or judicially enforce such payment is clearly erroneous and impinges upon this Court's and the NLRB's holdings that valid resignation from a labor union may be effected without penalty.

CONCLUSION

For all the foregoing reasons, the Petitioners and Intervenor request the Court to grant a Writ of Certiorari to review the decision and judgment of the Eleventh Circuit.

Respectfully submitted,

MERANZE AND KATZ

BY: Bernard N. Katz
Robert G. Rothstein
David W. Wolf

12th Floor, Lewis Tower Building
15th and Locust Streets
Philadelphia, Pa., 19102
(215) 546-4183

Of Counsel

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
DEC 12 1988
MIGUEL J. CORTEZ
CLERK

NO. 88-8032

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,

Plaintiffs-Appellees,

v.

LOCAL LODGE D111 OF THE CEMENT, LIME, GYPSUM AND ALLIED WORKERS DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion November 2, 1988, 11 Cir., 198__, ____F.2d ____).

Before TJOFLAT and FAY, Circuit Judges, and SHARP*, District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

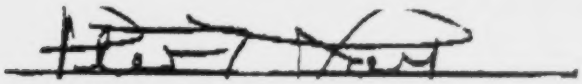
*Honorable G. Kendall Sharp, U.S. District Judge for the Middle District of Florida, sitting by designation.

Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:



United States Circuit Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 88-8032

D.C. Docket No. 487-127

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,

Plaintiffs-Appellees,

v.

LOCAL LODGE D111 OF THE CEMENT, LIME, GYPSUM AND ALLIED WORKERS DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Georgia

Before TJOFLAT and FAY, Circuit Judges, and SHARP*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

*Honorable G. Kendall Sharp, U.S. District Judge for the Middle District of Florida, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 2, 1988
For the Court: Miguel J. Cortez, Clerk

By: Karen McNabb
Deputy Clerk

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, Plaintiffs-Appellees,

v.

LOCAL LODGE D111 OF the CEMENT, LIME, GYPSUM AND ALLIED WORKERS DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, et al., Defendants-Appellants.

No. 88-8032.

United States Court of Appeals,
Eleventh Circuit.

Nov. 2, 1988.

International union brought action against local lodge and certain of its officers seeking to enforce contractual and fiduciary obligations. The United States District Court for the Southern District of Georgia, Savannah Division, No. CV487-127, B. Avant Edenfield, J., 681 F.Supp. 1570, granted international union's motion for summary judgment, and appeal was taken. The Court of Appeals, Fay, Circuit Judge, held that forfeiture clauses of international union's constitution and clauses of merger agreement allowing each local lodge to retain its treasury after merger were not inconsistent, and thus, merger clauses did not allow local lodge to retain local treasury after local lodge disbanded and dissolved,

Affirmed.

1. Labor Relations 777

International union's constitution and merger agreement were contracts within meaning of provision of Labor Management Relations Act conferring jurisdiction in federal courts over suits alleging violations of contracts between labor organizations. Labor Management Relations Act, 1947, §801(a), 29 U.S.C.A. §185(a).

2. Contracts 143(2)

Party cannot create contractual ambiguity merely by asserting that it exists; likewise, disputes over contractual terms, standing alone, reveal no ambiguity.

3. Labor Relations 143

Forfeiture clauses of international union's constitution and clauses of merger agreement allowing each local lodge to retain its treasury after merger were not inconsistent, and thus, merger clauses did not allow local lodge to retain local treasury after local lodge disbanded and dissolved; union constitution, which provided forfeiture of local's assets from disbandment after international union, constituted supreme law of merged organization, while merger agreement, governed effect of merger on local treasuries.

Appeal from the United States District Court for the Southern District of Georgia.

Before TJOFLAT and FAY, Circuit Judges, and SHARP*, District Judge.

FAY, Circuit Judge:

[1] Local Lodge D111 (Local D111), a former subordinate local lodge of the appellee union, International Brotherhood of Boilermakers (International), appeals the district court's order granting summary judgment in favor of International. Local D111 asserts that the district court erred in permitting International to take control of all funds, property, and assets which the local retained subsequent to its disaffiliation from International. Moreover, Local D111 contends that it was error for the district court to require it to remit past due per capita tax/division fund payments and submit monthly membership and quarterly audit

---

* Honorable G. Kendall Sharp, U.S. District Judge for the Middle District of Florida, sitting by designation.

reports to International.[1] The local argues that its agreement executed with International pursuant to the merger allows it to retain its assets and treasury upon disaffiliation. We hold that the International's constitution is consistent with the merger agreement and that the provisions of the constitution requiring forfeiture of a local's assets upon its disbandment from the International contractually bind the parties. Local D111 must therefore relinquish its assets to International and submit the required payments and reports. Accordingly, the order of the district court granting International summary judgment is affirmed.

I. BACKGROUND

The facts of this case, which the parties do not dispute, are thoroughly set forth in the trial court's order. *See International Brotherhood of Boilermakers v. Local Lodge D111*, 681 F.Supp. 1570 (S.D.Ga. 1987). For clarification however, we highlight the more relevant facts here.

The International Brotherhood of Boilermakers is an international labor organization which, together with Local D111, formerly served as collective bargaining representative of the employees of the Gold Bond Building Products facility in Savannah, Georgia. On April 1, 1984, International merged with the United Cement, Lime, Gypsum, and Allied Workers International Union (CWI) upon execution of a merger agreement setting forth the terms of the merger. The merger agreement

---

1. Additionally, the local asserts that no federal court jurisdiction exists in this suit. We find that the district court properly exercised jurisdiction pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), which confers jurisdiction in the federal courts over suits alleging violations of contracts between labor organizations. International's constitution and the merger agreement are contracts within the meaning of this section. *See Plumbers and Pipefitters v. Local 334*, 452 U.S. 615, 622, 101 S.Ct. 2546, 2550, 69 L.Ed.2d 280 (1981) (just as a union constitution is a "contract" within the plain meaning of §301(a), so too is it clear that [an International and its local] are "labor organization[s] representing employees in an industry affecting commerce as defined in this chapter.") Consequently, there is federal jurisdiction over this suit.

consolidated CWI and its local affiliates into the Cement Division of International. Local 111 of CWI was issued an International charter and became Local D111 of the merged organization. The preamble to the merger agreement expressly provides that International's constitution "will be the supreme law of the merged organization." (R. 2-9 Plaintiff's Exhibit No. 2.) Consequently, upon merger, Local D111 became bound by International's constitution and its directives.

In August 1986, delegates attending International's constitutional convention reaffirmed the merger. However, the adverse outcome of a Cement Division vice- presidential election held at the convention created dissention among several locals. In September 1986, Local D111 voted to disaffiliate from International. Local D111 retained its treasury and assets and refused to submit periodic membership and audit reports to International as required by its constitution.

On January 16, 1987 at a National Labor Relations Board (NLRB) election held to determine the appropriate collective bargaining representative for the Gold Bond employees, the employees rejected International as their representative and voted to affiliate with a rival international union; the Independent Workers of North America (Independent). The NLRB then certified Independent as the exclusive collective bargaining agent of the disaffiliated local. Upon learning of the NLRB election, International notified Local D111 on February 11, 1987 that the local was automatically disbanded and its charter revoked for lack of active union membership in accordance with International's constitution.

International brought suit against Local D111 seeking to enforce the contractual obligations outlined in its constitution pertaining to distribution of assets after a local disaffiliates from its parent union. International's constitution expressly provides that upon disbandment, assets of a local lodge shall be forfeited to the International (forfeiture clauses). Additionally, the constitution and merger agreement require Local D111 to remit monthly per capita tax/division fund payments to International calculable at 1.65 times the base labor rates at the lodge. The

constitution also mandates Local D111 to submit monthly membership and quarterly financial reports to International.

Local D111 never contested its obligations under the constitution nor its failure to abide by it from July 1986 through January 1987. However, Local D111 did contend that the merger agreement conflicted with and controlled the International constitution. Thus, pursuant to a merger agreement clause allowing each local lodge to retain its treasury after the merger (retain clause), Local D111 refused to forfeit its assets.

The district court concluded that International was entitled to judgment as a matter of law since the only issues presented concerned unambiguous contractual language and involved no genuine questions of material fact. In so ruling, the court found that the forfeiture clauses of International's constitution and the retain clause of the merger agreement were consistent, and that read together, these contractual provisions called for forfeiture of the local's funds and assets to International. We agree with the district court's conclusions.

II. ANALYSIS

Since this is an appeal from the grant of summary judgment, we must examine the evidence in the light most favorable to Local D111. *See* Fed.R.Civ.P. 56(c); *Everett v. Napper,* 833 F.2d 1507, 1510 (11th Cir. 1987). Summary judgment is proper only if no genuine issue of material fact exists and if International is entitled to judgment as a matter of law. *Id.* Although we find that no genuine issue of material fact exists in this case[2], we must

---

2. The court rejects Local D111's contention that genuine issues of material fact exist in this case. Each of the alleged factual disputes relate to asserted defenses and involve purely legal questions stemming from the court's interpretation of the unambiguous contracts between the labor organizations involved here. According to the United States Supreme Court: "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-324, 106 S.Ct. 2348, 2553, 91 L.Ed.2d 265 (1986). Moreover, "the mere existence of *some* alleged factual dispute . . .will not defeat an otherwise properly supported motion for summary judgment."

examine whether International is entitled to summary judgment as a matter of law.

A. Forfeiture of Assets and Treasury

[2] The contractual relationship between International and Local D111, as set forth in the union's constitution and the merger agreement, provides the basis for analyzing whether International is entitled to the local's assets and treasury. Under contract law principles, "where the language of a contract is unambiguous, the legal effect of that language is a question of law." *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1854, 1360 (11th Cir. 1988). The preliminary inquiry of whether a contractual ambiguity exists is also a question of law which the court may resolve summarily. *Id.; Freeman v. Continental Gin Co.*, 881 F.2d 459, 465 (5th Cir. 1967). A contract term is ambiguous if it is reasonably susceptible of more than one interpretation. *Orkin, supra,* at 1860. However, a party cannot create a contractual ambiguity merely be asserting that it exists. Likewise, disputes over contractual terms, standing alone, reveal no ambiguity. *Id.* (citing *Vreeland v. Federal Power Comm'n*, 528 F.2d 1343, 1351 (5th Cir. 1976))

[3] The trial court found the contractual language unambiguous, and ruled as a matter of law that the union constitution embodied the supreme law of the merged organization while the merger agreement governed *"the effect of the merger* on local treasuries." *Local Lodge D111, supra,* at 1574. In reviewing the district court's findings that the contract is unambiguous, we examine the disputed contractual terms in the context of the entire agreement, giving the words their plain and ordinary meaning as understood by a reasonable person. *Universal Towing Co. v. United Barge Co.*, 579 F.2d 1098, 1101 (8th Cir.

NOTES *(Continued)*

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Local D111 has failed to specify facts which show a genuine issue for trial. Thus, the district court applied the correct summary judgment standard here.

1978). Given the plain language of these agreements, we find the district court's conclusions reasonable.

Article V, Section 6 of International's constitution states:

> Any Local Lodge having less than ten (10) active members shall be automatically disbanded and its Charter returned to the International Brotherhood, together with all books, records, properties, funds, and assets (including trusts, trust funds or other trust properties held, operated or controlled by such Local Lodge) owned or held by such Local Lodge at the time of such disbanding, which shall become the property of the International Brotherhood.

Article XXXVI, Section 2 of the constitution also provides, in pertinent part:

> The funds and property of a subordinate body are trust funds for the benefit of its members and shall not be divided in any manner among the members of the subordinate body. Upon the surrender, forfeiture or revocation of its charter other than through consolidation, all funds belonging to such subordinate body shall be forwarded promptly to the International Secretary-Treasurer and all real estate and other property owned or held by such body shall be immediately transferred and conveyed by the proper legal instrument to the International Board of Trustees of the International Brotherhood.

Local D111 cites two provisions in the merger agreement which it contends conflict with and override International's constitution. First, Article V, Section 3 of the Merger Agreement provides in relevant part:

> Local Union Charters held by the current Local Unions in the [CWI] will have issued in their stead Boilermaker Charters carrying the present local numbers preceded by a capital D. Each Local Lodge will retain its Local Union treasury.

Second, the preamble to the merger agreement states:

> The Constitution of the International . . . will be the supreme law of the merged organization.
>
> All provisions of this Agreement are binding and those provisions which conflict with the above referred to Constitution will expire at 12:01 a.m. on the convening date of the Twenty-Eighth Consolidated Convention.[3]

As the district court noted, Local D111's contention that the retain clause conflicts with the forfeiture clauses is without merit. Following established contract principles, the plain language of these provisions shows that they are consistent. The retain clause in the merger agreement is located under Article V which is entitled "Jurisdiction of District and Local Lodges." The scope of this section encompasses the changes the CWI locals would undergo as a result of the merger with International. Pursuant to this provision, the local lodges retained their local treasuries after completion of the merger.

This section does not conflict with Article V or Article XXXVI of International's constitution. Those articles involve forfeiture of the local's assets after the local ceases to maintain at least ten active members, ie; upon disaffiliation and revocation of its charter. While the merger agreement permitted the locals to maintain control over their assets and treasury while affiliated with International after the merger, once the local no longer existed, it lost this control. This reading of the two clauses is clear and unambiguous.

The parties do not dispute that on January 16, 1987, after Local D111 ceased to be a local lodge of International upon affiliation with Independent, the active membership of *Local D111* fell below ten members. (Stipulation R. 2-13-2). Nor do the parties disagree that in February, 1987 International revoked Local D111's charter for precisely this reason. *Id.* International clearly possessed the power, pursuant to the unambig uous terms of its constitution, to disband Local D111 automatically after it learned of the local's affiliation with a rival union.

---

3. The Twenty-Eighth Consolidated Convention is scheduled to convene in the year 1991.

After the disaffiliation, the constitutional forfeiture provisions went into effect requiring Local D111 to surrender its assets and treasury to International. The district court correctly concluded that the retain clause of the merger agreement operated to vest control over the local's treasury in the local subsequent to the merger, *only* while it remained part of the parent union. Article V, Section 6 of the constitution reiterates this view:

> If ten (10) or more members *maintain membership* in such Local Lodge and *otherwise comply with the provisions of this Constitution*, all books, records, properties, funds and assets . . . owned or held by such Local Lodge shall remain the property of such Local Lodge *so long as the Charter is maintained* (emphasis added).[4]

Once Local D111 ended its affiliation with International and lost its charter, it could no longer exercise control over the assets pursuant to the merger agreement. Since the provisions of these agreements are consistent and the language is unambigious, we find that the forfeiture clauses contractually mandate Local D111 to surrender its assets and treasury to International.[5]

---

4. This provision (in Article V of the International constitution) wholly comports with the similarly listed Article V of the merger agreement. Both articles vest control of the assets in the local lodge so long as its charter is maintained. The retain clause itself supports this view since it permits only the *local lodge* to retain control of its treasury after the merger. The merger agreement vests no control in the individual members of the local regarding the assets. Article XXXVI, Section 2 of International's constitution expressly prohibits division of the local's assets among the individual members. Considering these clauses together, the local is contractually obligated to surrender its assets upon disaffiliation.

5. Additionally, Local D111 is bound by the directives set forth in Article V, Section 6 of the constitution since the merger agreement, upon which the local exclusively relies as the controlling contract between the parties, specifically designates the International constitution as the supreme law governing the parties. Likewise, Local D111's by-laws expressly recognize International's constitution as the "governing document for the International Brotherhood and all its affiliated bodies, including district and local lodges. . . ." (R. 2-9 Plaintiff's Exhibit No. 4.)

Several other federal courts have reached the same conclusion on identical facts. In *International Brotherhood of Boilermakers v. Local Lodge D296,* 687 F.Supp. 469, 470 (D. Ariz. 1988), another case involving the same International constitution and merger agreement, the district court held that the local affiliate must surrender all funds and assets it retained subsequent to the revocation of its charter. The court stated that the retain clause of the merger agreement did not supersede the International constitution, but rather was wholly consistent with it. *Id.* Moreover, the court found that the local's obligations regarding the submission of payments and reports continued from the disaffiliation date through the date the charter was revoked. *Id.* at 471. Consequently, it was required to remit the fees and file the reports with International.

Similarly, the district court in *International Brotherhood of Boilermakers v. Local Lodge D238,* 678 F.Supp. 1575, 1582 (M.D. Ga. 1988) held that "[u]pon the disbandment of the lodges and the revocation of the charters, the assets must, pursuant to the . . . provisions in the Boilermaker's constitution, be forfeited to the parent international. The local lodges agreed to this requirement." *See also International Brotherhood of Boilermakers v. Local Lodge 714,* 663 F.Supp. 1071 (N.D.Ill. 1987), *vacated,* 845 F.2d 687, 692 (7th Cir. 1988) (if less than ten members comprised local after disaffiliation, all property and assets revert to the international).[6] Thus, Local D111 must surrender its assets and treasury.

---

6. Various federal courts have dealt with cases involving similar issues between the same unions. *See International Brotherhood of Boilermakers v. Local Lodge D461,* 663 F.Supp. 1031, 1035 (M.D.Ga.), *aff'd,* 835 F.2d 1439 (11th Cir. 1987); *International Brotherhood of Boilermakers v. Local Lodge D405,* _____ F.Supp. _____, No. 87-24-PCT-EHC, slip op., 17 (D.Ariz. April 25, 1988); *International Brotherhood of Boilermakers v. Local Lodge D474,* 673 F.Supp. 199 (W.D. Tex. 1987).

We note, however, that the district court in *International Brotherhood of Boilermakers v. Local Lodge D504,* No. 87-5689, bench op., (E.D. Pa. April 21, 1988) held that although the local must forfeit its assets upon disaffiliation from the International, it could retain its treasury. We decline to follow this holding.

B. Per Capita Tax/Division Fund Payments

Local D111 contends that the district court erred in requiring it to remit past due Per Capita Tax/Division Fund Payments in the amount of $10,797.15 for the period extending from July 1986 through January, 1987. The local argues that the International's actions caused the breakdown of collective bargaining representation necessitating its disaffiliation, it was not obligated to remit the monthly fees from that date. We affirm the district court's ruling that the local is contractually bound to pay this amount.

Local D111 admits its obligation, pursuant to Article XXIII, Section 3(b) of International's constitution and Article XII of the merger agreement, to pay a monthly per capita fee to International based on the labor rate at the lodge. Additionally, Local D111 does not dispute International's figures regarding the monthly amount due. Since no genuine factual issue exists concerning this claim and the agreements clearly delineate the local's contractual obligations, we hold as a matter of law that International is entitled to the full amount claimed. *See Local Lodge D296, supra,* at 471 (local's failure to notify international that it was forfeiting its charter contractually bound local to pay the tax until the date the charter was revoked).

C. Monthly Membership and Quarterly Financial Reports

The same reasoning applies to Local D111's assignment of error to the district court's ruling that it was obligated to submit monthly membership and quarterly financial reports to International. Article XXV, Section 7(a) mandates the local's Secretary-Treasurer to submit these reports. International claims it is entitled to them. Local D111 again, does not dispute this contractual requirement but argues that its obligation ceased upon its disaffiliation. We agree with the district court that the constitution clearly specifies the local's duties and that it was bound by the provision until the date International revoked its charter for lack of active union membership.

III. CONCLUSION

International's constitution and the merger agreement comprise the contract between the parties here. The contract is unambiguous and its provisions are consistent. The constitution clearly requires a local to forfeit its assets upon disaffiliation from the parent union. Moreover, it specifically delineates the local's obligations to remit per capita fees and submit periodic status reports. Accordingly, the district court's grant of summary judgment in favor of International is AFFIRMED.

United States District Court

SOUTHERN DISTRICT OF GEORGIA

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

v.

LOCAL LODGE D111 OF THE CEMENT, LIME, GYPSUM AND ALLIED WORKERS, et al.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV487-127

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with such decision entered December 15, 1987, judgment in the amount of $10,797.15 is hereby entered in favor of the plaintiff and against defendant Local Lodge D111, representing past due Per Capita Tax/Divison Fund payments.

E.O.D.
12/15/87
DATE

FRS
INITIALS

December 15, 1987
Date

Henry R. Crumley, Jr.
Clerk

Meg R. Stalvey
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *Plaintiff*	)	
vs.	)	
LOCAL LODGE D111 OF THE CEMENT, LIME, GYPSUM AND ALLIED WORKERS, DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, RONNIE BRANT, INDIVIDUALLY AND AS PRESIDENT OF LOCAL LODGE D111; MARSHA PINKNEY, INDIVIDUALLY AND AS RECORDING SECRETARY OF LOCAL LODGE D111, AND FREDDIE STEPHENS, INDIVIDUALLY AND AS FINANCIAL-SECRETARY OF LOCAL LODGE D111, *Defendants*	)	CV487-127

ORDER

Before the Court is the motion for summary judgment of plaintiff, International Brotherhood of Boilermakers.

I. Background

This action was brought by the International Brotherhood of Boilermakers (hereinafter IBB) against one of its subordinate local lodges (Local Lodge D111) and certain of the local's lodge officers. Plaintiff seeks to enforce contractual and fiduciary obligations allegedly owing to IBB by defendants.

IBB is an international labor organization headquartered in Kansas City, Kansas. In April, 1984, the IBB merged with the United Cement, Lime, Gypsum and Allied Workers International Union (hereinafter CWI). The terms of the merger between the two internationals were set forth in a document executed on April 1, 1984, and entitled Merger Agreement. The Merger Agreement provided that the CWI and its affiliated district councils would cease to exist as separate entities and would merge into the Cement Division of the IBB.

The Merger Agreement called for all CWI local unions in existence at the time of the merger to become and remain affiliated with the Cement Division of the IBB. The Agreement required the IBB to issue IBB charters to those locals which charters were to replace the former CWI charters. The CWI local numbers were retained except that after the merger the numbers were preceded by a "D" to identify such locals as affiliated with the Cement Division of the IBB. Defendant Local Lodge D111 (hereinafter "D111") was one of the local unions formerly affiliated with CWI and, pursuant to the terms of the Merger Agreement, the IBB issued a charter to D111.

After the merger, D111 and IBB jointly represented employees at the Gold Bond Building Products facility in Savannah, Georgia.

Pursuant to the terms of the Merger Agreement and the IBB Constitution, Local Lodge D111 was obligated to make payments to the IBB in the form of Per Capita Tax/Division Fund payments. The local lodge was required to submit, on a monthly basis, a per capita payment in an amount of 1.65 times the base labor rate at the lodge.

Plaintiff alleges that defendants have breached the Merger Agreement and Union Constitution by failing to transmit to IBB

the required payments for the months of July, 1986 through January, 1987, inclusive. Defendants do not dispute this claim. Plaintiff also alleges that defendants have breached contractual obligations under the Union Constitution to make monthly membership reports and quarterly financial reports to IBB. Defendants do not controvert this claim either.

On January 16, 1987, an election was held by the National Labor Relations Board (NLRB) to determine the appropriate collective bargaining representative of the employees at the Gold Bond Building Products facility in Savannah. A majority of the employees who voted rejected the IBB and its local lodge D111 as their exclusive bargaining agent. Instead, they selected a new representative: the Independent Workers of North America (IWNA). IWNA was certified by the NLRB as the new exclusive collective bargaining agent as a result of the election.

Plaintiff alleges that, pursuant to a provision in the IBB Constitution, the local IBB charter of D111 was revoked after the employees at Gold Bond rejected IBB as their representative. As a a result, plaintiff contends D111 is required to turn over all books, records, properties, funds and assets owned or held by D111 at the time of the revocation of its IBB charter to IBB pursuant to the IBB Constitution.

Defendants contend that they are entitled to retain their local treasury pursuant to a provision of the Merger Agreement which they allege both conflicts with the IBB Constitution and is controlling.

Plaintiff requests the following relief: (1) judgment in the amount of $10,797.15 representing the past due Per Capita Tax/Division Fund payments for the months of July, 1986 through January, 1987; (2) an order enjoining defendants from disposing of, or in any manner changing the current status of, properties, funds, and assets of D111; (3) an order directing the defendants to render an accounting of any and all properties, funds and assets of former Local Lodge D111 in the control of defendants during the period from July 1, 1986 to the present; (4) an order directing defendants to deliver to IBB any and all funds and property of former Local Lodge D111 in their possession or control; (5) an order directing defendants to

submit, upon request of IBB, the monthly membership reports and quarterly audit reports for the periods during which such reports were not provided through the data of the revocation of the charter of Local Lodge D111; and (6) continued jurisdiction by this Court until all issues arising out of this action are resolved.

II. Analysis

A. Jurisdiction

The Court has jurisdiction pursuant to Section 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. §185(a), which confers jurisdiction over suits for violations of contracts between labor organizations. Both the IBB Constitution and the Merger Agreement at issue here are contracts between labor organizations within the meaning of 29 U.S.C. §185(a). *See Plumbers and Pipefitters v. Local 334*, 452 U.S. 615 (1981)[1] In addition, the Court has pendent jurisdiction over plaintiff's state law breach of fiduciary duty claims against the individual union officials. There is no need to address whether the Labor Management Reporting and Disclosure Act gives standing to unions to sue for breach of fiduciary duties by union officials under 29 U.S.C §501[2] because, as will be seen, all of the relief

---

1. The Court rejects defendants' contention that §301 jurisdiction does not extend to the claims against the individual union officials because there is not a "significant impact on labor-management relations." The Supreme Court rejected the significant impact requirement in *Plumbers and Pipefitters v. Local 334*, 452 U.S. at 615, 624-25. Section 301 does not allow, however, for the recovery of monetary damages against individual union officials. *See* 29 U.S.C. §185(b); *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981); *Rogers v. Fedco Freight Lines, Inc.*, 564 F. Supp. 1169, 1174 (S.D.Ohio 1983).

2. Title 29 U.S.C. §501(b) expressly confers standing only on union members, not unions themselves. Most of the cases addressing the issue have held that unions do not have such standing. *See Local 624, International Union of Operating Engineers v. Byrd*, 659 F. Supp. 274 (S.D.Miss. 1986); *Graphic Arts International v. Local No. 529*, 529 F. Supp. 587 (W.D.Mo. 1982); *Local No. 512, IBT v. Baker*, 473 F. Supp. 1120 (M.D.Fla. 1979); *Safe Workers' Organization v. Ballinger*, 389 F. Supp. 903, 907-08 (S.D.Ohio 1974). *But see BRAC v. Orr*, 95 LRRM 2701 (E.D.Tenn. 1977) (standing of unions to sue for breach of fiduciary duty under 29 U.S.C. §501(b) is implied by requirement

sought by plaintiff is available pursuant to contractual rights, and it is unnecessary to reach the merits of plaintiff's breach of fiduciary duty claims.

B. Per Capita Tax/Division Fund Payments

Defendants concede that under both the IBB Constitution, Article XXIII, §3(b), and the Merger Agreement, Article XII, they were required to pay on a monthly basis, a per capita payment in an amount of 1.65 times the base labor rate at the Lodge.

Plaintiff has shown, through the affidavit of Henry Bechtoldt, Vice-president of IBB, that the base rate for Local Lodge D111 was fixed at $8.27, and that Local Lodge D111 had 113 dues paying members. *See* Bechtoldt Affidavit at 6, ¶13. Accordingly, the monthly amount due as the Per Capita Tax/Division Fund Payment was $1,542.45, which sum was not paid as required for the months of July 1986 through January 1987, inclusive. Thus, according to plaintiff, the total amount due is $10,797.15.

Defendants have not controverted plaintiff's allegations or figures with respect to this claim. Accordingly, plaintiff's motion for summary judgment with respect to the Per Capita Tax/Division Fund payment is GRANTED for the full amount sought; $10,797.15.

C. Monthly Membership Reports and Quarterly Financial Reports

Under the IBB Constitution, the Secretary-Treasurer (Financial Secretary) of Local Lodge D111 was obligated both to submit monthly membership reports, and to make quarterly financial reports to plaintiffs. IBB Constitution, Article XXV, Section 7(a). Plaintiff alleges that Local Lodge D111 has not made all of the required monthly membership reports and quarterly audit reports. *See* Bechtoldt Affidavit at 8, ¶16. This

---

NOTES *(Continued)*

that union members desiring to sue under the statute first make demand upon their union to file suit).

allegation is uncontroverted. Accordingly, plaintiff's motion for summary judgment is GRANTED with respect to the claim that defendants breached their contractual obligation to submit monthly membership reports and quarterly financial reports.

D. Surrender of Local's Assets Upon Revocation of Charter

The question whether Local Lodge D111 was required to surrender its assets to plaintiff upon disbandment is the only *bona fide* issue of dispute between the parties. Resolution of this issue depends upon the meaning of certain provisions in the Union Constitution and the Merger Agreement.

Plaintiff relies on, and seeks to enforce, Article V, Section 6 of the IBB Constitution, which provides that

> Any Local Lodge having less than ten (10) active members shall be automatically disbanded and its Charter returned to the International Brotherhood, together with all books, records, properties, funds and assets (including trusts, trust funds or other trust properties held, operated or controlled by such Local Lodge) owned or held by such Local Lodge at the time of such disbanding, which shall become the property of the International Brotherhood.

Plaintiff also relies on Article XXXVI, Section 2 of the IBB Constitution, which provides in pertinent part:

> The funds and property of a subordinate body are trust funds for the benefit of its members and shall not be divided in any manner among the members of the subordinate body. Upon the surrender, forfeiture or revocation of its charter other than through consolidation, all funds belonging to such subordinate body shall be forwarded promptly to the International Secretary/Treasurer and all real estate and other property owned or held by such body shall be immediately transferred and conveyed by the proper legal instrument to the International Board of Trustees of the International Brotherhood.

It is undisputed that, after the NLRB election of January 16, 1987, Local Lodge D111 ceased to have ten (10) or more

members, and was automatically disbanded. Plaintiff contends that, in accordance with the above-quoted provisions (hereinafter the "Surrender Clauses"), it is entitled to all books, records, properties, funds and assets owned or held by Local Lodge D111 at the time of its disbandment.

Defendants contend that a provision in the Merger Agreement conflicts with, and overrides, the Surrender Clauses.

The Merger Agreement provides in its preamble as follows:

> The Constitution of the International Brotherhood of Boilermakers . . . will be the supreme law of the merged organization.
>
> All provisions of this Agreement are binding and those provisions which conflict with the above referred to Constitution will expire at 12:01 a.m. on the convening date of the Twenty-Eighth Consolidated Convention.
>
> The Twenty-Eighth Consolidated Convention will not convene until 1991. Thus, provisions of the merger agreement which conflict with the Constitution are controlling until 1991.
>
> Article V, Section 3 of the Merger Agreement provides, in pertinent part:
>
> Local Union Charters held by the current Local Unions in the [CWI] will have issued in their stead Boilermaker Charters carrying the present local numbers preceded by a capital D. *Each Local Lodge will retain its Local Union Treasury*. (Emphasis added).

Defendants argue that this provision (the "Retain Clause") conflicts with the Surrender Clauses, and is controlling. The defendants' argument is unavailing. The Surrender Clauses in the Constitution and the Retain Clause in the Merger Agreement are not in conflict, and may be easily reconciled.

The Merger Agreement governed *the effect of the merger* on local treasuries. Pursuant to the Merger Agreement, local lodges, including Local Lodge D111, did not have to surrender their treasuries upon consummation of the merger. The local

lodges retained, and exercised independent control over, their treasuries. Local Lodge D111 received the benefit of the Retain Clause, during D111's existence as a local lodge of IBB, it retained its treasury.

The Merger Agreement does not provide, however, that the *members* of a local may "retain" the local treasury after the local lodge had disbanded and dissolved. The Merger Agreement provides only that *the local lodge* shall retain the local treasury; when the local lodge ceases to exist and its charter is duly revoked, the Retain Clause no longer applies. The Merger Agreement does not address the contingency of disbandment of a local lodge. The Constitution, however, does address the contingency of disbandment. The Constitution provides that, in the event of disbandment, funds and assets of the local are forfeited to the plaintiff.

Additional language in the IBB Constitution, Article V, Section 6 (the Surrender Clause), supports this construction.

> If ten (10) or more members maintain membership in such Local Lodge and otherwise comply with the provisions of this Constitution, all books, records, properties, funds, and assets . . . owned or held by such Local Lodge shall remain the property of such Local Lodge *so long as the charter is maintained.*

The Retain Clause in the Merger Agreement is wholly consistent with the Union Constitution. During its continued existence as a local lodge of IBB, D111 retained its local union treasury. Now that D111 is no longer a local lodge of IBB, it must surrender its assets to IBB in accordance with the IBB Constitution which, according to the Merger Agreement, is the "supreme law of the merged organization."

The substantive law under 29 U.S.C. §185(a) which the Court has applied in its construction of these labor contracts "is federal law, which courts must fashion from the policy of our national labor laws." *Plumbers and Pipefitters v. Local 334,* 452 U.S. 615, 627 (1981). The Court in *Plumbers* noted that the purpose of Congress in enacting the LMRA was to promote industrial stability and stability among labor organizations.

Several courts have already recognized, as is obvious, that the enforcement of clauses requiring a local to surrender its assets upon disaffiliation contributes to the stability of labor organizations. *See Phillips v. Perrin,* 252 Or. 540, 450 P.2d 767, 771 (1969) ("A rule that would permit seceding locals to take their property with them in defiance of international constitutional provisions . . . could breed a renewal of raiding by rival unions as well as the fragmentation of established international unions to the ultimate disadvantage of the workmen . . . ."); *Bradley v. O'Hare,* 202 N.Y.S.2d 141, 148, 11 A.2d 15 (1960) (enforcement of clauses requiring locals to surrender their assets contributes to the stability of labor organizations).

Another indication of federal labor policy, and further support for the Court's construction of the relevant contract provisions in this case, can be found in the Labor Management Reporting and Disclosure Act, 29 U.S.C. §501(a):

> The officers, agents, shop stewards,and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, expend the same in accordance with its constitution and by-laws and any by-laws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party in any manner connected with his duties . . . .

To construe the Merger Agreement as allowing local union officials to take away the local treasury after disaffiliation would conflict with the dictates of 29 U.S.C. §501(a), which requires local union officials to remain loyal to the parent organization. These fiduciary duties exist whether or not the union itself has standing to bring for breach of such fiduciary duties under §501(b). *See supra,* note 2.

The Retain Clause in the Merger Agreement is consistent with the Surrender Clauses in the Union Constitution. By virtue

of the Retain Clause, Local Lodge D111 was entitled to retain its local treasury upon consummation of the merger and during its existence as a local lodge of IBB. By virtue of provisions of the Union Constitution, all funds and assets of Local Lodge D111 were forfeited to IBB upon disbandment.

III. Conclusion

For the foregoing reasons, plaintiff's motion for summary judgment is GRANTED. It is hereby ORDERED as follows:

(1) that the defendants are hereby restrained from disposing of or in any manner changing the current status of any funds or property of former Local Lodge D111 of the IBB which is in their possession or control;

(2) that the defendants render a complete accounting to the plaintiff of any funds or property of former Local Lodge D111 which has been in their possession or control at any time during the period from July 1, 1986 to the present;

(3) that judgment in the amount of $10,797.15 be entered in favor of the plaintiff and against defendant Local Lodge D111, representing past due Per Capita Tax/Division Fund payments;

(4) that defendants deliver any and all funds or property of former Local Lodge D111 which is in their possession or control to plaintiff;

(5) that defendants, upon request of plaintiff, submit the monthly membership reports and quarterly audit reports for the periods during which they were not provided up to the date of revocation of the charter of Local Lodge D111;

(6) This action will remain on the civil docket for the adjudication of any issue in regard to the Court's Order. Upon final resolution, by agreement, compliance, or otherwise, plaintiff will submit an appropriate final order.

SO ORDERED, this 15 day of December, 1987.

JUDGE, UNITED STATES DISTRICT
COURT
SOUTHERN DISTRICT OF GEORGIA

Supreme Court, U.S.
FILED
APR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LOCAL LODGE D111 OF THE CEMENT, LIME, GYPSUM AND ALLIED WORKERS, DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO; RONNIE BRANT, Individually and as President of LOCAL LODGE D111; MARSHA PINKNEY, Individually and as Recording Secretary of LOCAL LODGE D111; and FREDDIE STEPHENS, Individually and as Financial Secretary of Local Lodge D111

and

INDEPENDENT WORKERS OF NORTH AMERICA

Petitioners and Intervenor,

v.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Michael J. Stapp
(Counsel of Record)
Blake & Uhlig, P.A.
475 New Brotherhood Building
753 State Avenue
Kansas City, Kansas 66101
ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

Should this Court review by writ of certiorari a decision by the lower court that the terms of a contract between two (2) labor organizations are not ambiguous?

PARTIES TO THE PROCEEDING

Although Petitioners do not separately list the parties, the cover of the Petition for Writ of Certiorari lists the Independent Workers of North America (hereinafter IWNA) as an Intervenor. The IWNA did not intervene at any stage of the proceedings either before the Circuit Court of Appeals or the District Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATUTORY PROVISIONS	ix
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED	5
I. Certiorari Should Not Be Granted Because The Decision Below Does Not Create A Conflict Among The Circuits	5
II. Certioari Should Not Be Granted Because The Decision Below Is Based Upon The Distinctive Contractual Arrangement Between The Parties	10
III. Certioari Should Not Be Granted Because The Decision Below Comports With Federal Labor Policy	11
A. Federal Labor Policy Favors Enforcement Of The IBB Constitution	12
B. Enforcement Of The IBB Constitution Does Not Interfere With Employee Rights To Select Their Own Collective Bargaining Representative	18
C. The IBB Constitution Does Not Require Members To Continue Paying Per Capita Tax After Resignation	21
CONCLUSION	22

TABLE OF AUTHORITIES

Page

Cases:

Alvino v. Carraccio, 400 Pa. 477, 162 A.2d 358, 46 L.R.R.M. (BNA) 2541 (Pa. 1960) 14

Bowman v. Moe, 66 Wash. 2d 629, 404 P.2d 437, 60 L.R.R.M. (BNA) 2284 (Wash. 1965) 14

BRAC v. Orr, 95 L.R.R.M. (BNA) 2701 (E.D. Tenn. 1977) 12

Bradley v. O'Hare, 202 N.Y.S.2d 141, 46 L.R.R.M. (BNA) 2672 (N.Y. Sup. Ct. 1960) 14

Electrical Workers v. Foust, 442 U.S. 42, 99 S. Ct. 2121, 60 L. Ed.2d 698 (1979) 15

Fisher v. Behr, 30 L.R.R.M. (BNA) 2116 (N.Y. Sup. Ct. 1952) 12

Georgia Kaolin, 287 N.L.R.B. No. 50 (1987) 14

Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed.2d 1178 (1967) 11

Goodman v. Lukens Steel Company, 482 U.S. 656, 107 S. Ct. 2617, 96 L. Ed.2d 572 (1987) 10

Grain Millers Local v. Grain Millers International, 59 L.R.R.M. (BNA) 3025 (Neb. D.C. 1965) 12

Harker v. McKissock, 7 N.J. 323, 81 A.2d 480, 28 L.R.R.M. (BNA) 2204 (N.J. 1951) 13

International Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233, 91 S. Ct. 609, 28 L. Ed.2d 10 (1971) 13

International Brotherhood of Boilermakers v. Local Lodge 714, 845 F.2d 687 (7th Cir. 1988) 5, 6, 7, 8, 9, 12

International Brotherhood of Boilermakers v. Local Lodge D111, 681 F. Supp. 1570 (S.D. Ga. 1987), *aff'd*, 858 F.2d 1559 (11th Cir. 1988) 7, 12, 17, 21

International Brotherhood of Boilermakers v. Local Lodge D238, 678 F. Supp. 1575 (M.D. Ga. 1988), *aff'd.*, 865 F.2d 1228 (11th Cir. 1989) 9, 12, 14, 15, 20, 21

International Brotherhood of Boilermakers v. Local Lodge D296, 687 F. Supp. 469 (D. Ariz. 1988) 8, 9, 12, 17

International Brotherhood of Boilermakers v. Local Lodge D31, 694 F. Supp. 1203 (D. Md. 1988) 10

International Brotherhood of Boilermakers v. Local Lodge D405, 699 F. Supp. 749 (D. Ariz. 1988) 10, 12

International Brotherhood of Boilermakers v. Local Lodge D461, 663 F. Supp. 1031 (M.D. Ga. 1987), *aff'd*, 835 F.2d 1439 (11th Cir. 1987) 12

International Brotherhood of Boilermakers v. Local Lodge D474, 673 F. Supp. 199 (W.D. Tex. 1987) 12, 20

International Brotherhood of Boilermakers v. Local Lodge D504, ____F.2d ____, 130 L.R.R.M. (BNA) 2528 (3rd Cir. 1989) .. 7, 9, 12, 21

International Brotherhood of Boilermakers v. Local Lodge D522, 815 F.2d 912 (3rd Cir. 1987) 7

International Brotherhood of Teamsters v. United States, 275 F.2d 610 (4th Cir. 1960), *cert. denied*, 362 U.S. 975 12

International Union v. Local 450, 271 Minn. 181, 135 N.W.2d 697, 59 L.R.R.M. (BNA) 2288 (Minn. 1965) 12

Kearney & Trecker v. NLRB, 210 F.2d 852 (7th Cir. 1954), *cert. denied*, 348 U.S. 824 21

Local 1 v. International Brotherhood of Teamsters, 461 F. Supp. 961 (E.D. Penn. 1978), *aff'd in part*, 614 F.2d 846 (3rd Cir. 1980) 12

Louisville Railroad, 90 N.L.R.B. 678 (1950) 14

McVicker v. International Union of District 50, Allied and Technical Workers, 327 F. Supp. 296 (N.D. Ohio 1971)..... 14, 19, 20

Michigan Teamsters Joint Council v. Bufalino, 626 F. Supp. 51 (E.D. Mich. 1985) 12

Mishkin v. New York, 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed.2d 56 (1966)..... 11

NEA v. Dade County Class Room Teachers Association, 407 F. Supp. 739 (S.D. Fla. 1974), *aff'd*, 527 F.2d 1388 (5th Cir. 1976), *cert. denied*, 429 U.S. 827..... 14, 19

NLRB v. Allis–Chalmers, 388 U.S. 175, 87 S. Ct. 2001, 18 L. Ed.2d 1123 (1967) 18

NLRB v. Boeing Company, 412 U.S. 67, 93 S. Ct. 1952, 36 L. Ed.2d 752 (1973)..... 18, 19

NLRB v. Financial Institution Employees, Local 1182, 475 U.S. 192, 106 S. Ct. 1007, 89 L. Ed.2d 151 (1986)..... 19

NLRB v. Granite State Joint Board, 409 U.S. 213, 93 S. Ct. 385, 34 L. Ed.2d 422 (1972) 18

NLRB v. Hershey's Chocolate Corporation, 297 F.2d 286 (3rd Cir. 1961)..... 14

Pattern Makers' League v. NLRB, 473 U.S. 95, 105 S. Ct. 3064, 87 L. Ed.2d 68 (1985) 18

Pizer v. Brown, 133 Cal. App. 2d 367, 283 P.2d 1055, 36 L.R.R.M. (BNA) 2341 (Cal Dist. Ct. App. 1955), *cert. denied*, 351 U.S. 982 12

Plumbers and Pipefitters v. Local 334, 452 U.S. 615, 101 S. Ct. 2546, 69 L. Ed.2d 280 (1981) 13, 19

Prudential Insurance Company, 106 N.L.R.B. 237 (1953) 14

Sawyers v. Grand Lodge, International Association of Machinists, 279 F. Supp. 747 (E.D. Mo. 1967) 14, 20

Scofield v. NLRB, 394 U.S. 423, 89 S. Ct. 1154, 22 L. Ed.2d 385 (1969) 18

Springfield v. Kibbe, 480 U.S. 257, 107 S. Ct. 1114, 94 L. Ed.2d 293 (1987) 11

Textile Workers v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed.2d 972 (1957) 13

Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, 57 U.S.L.W. 4283 (1989) 10

United Steelworkers v. Sadlowski, 457 U.S. 102, 102 S. Ct. 2339, 72 L. Ed.2d 707 (1982) 19

United Steelworkers v. Warrior & Gulf Navigation Company, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed.2d 1409 (1960) 14

Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed.2d 842 (1967) 15

Walter Kidde v. United Electrical Radio & Machine Workers, 7 N.J. 528, 82 A.2d 184, 28 L.R.R.M. (BNA) 2241 (N.J. 1951) ... 13, 14

Wells v. Waukesha County Marine Bank, 135 Wis. 2d 519, 401 N.W.2d 18, 124 L.R.R.M. (BNA) 2735 (Wis. Ct. App. 1986)..... 14

STATUTES:

28 U.S.C. § 1441 3

29 U.S.C. § 151 14

29 U.S.C. § 157 ..... 11, 18

29 U.S.C. § 185 ..... 3, 13, 19

29 U.S.C. § 401 ..... 11, 16

29 U.S.C. § 501 ..... 11, 16, 17

STATUTORY PROVISIONS

In addition to the statutory provisions set forth in the Petition for Writ of Certiorari, this case involves the following statutory provisions.

29 U.S.C. § 185:

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent — Entity for purposes of suit — Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district court in which its duly authorized

officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

No. 88-1490

In The

Supreme Court of the United States

October Term, 1988

LOCAL LODGE D111 OF THE CEMENT, LIME, GYPSUM AND ALLIED WORKERS, DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO; RONNIE BRANT, Individually and as President of LOCAL LODGE D111; MARSHA PINKNEY, Individually and as Recording Secretary of LOCAL LODGE D111; and FREDDIE STEPHENS, Individually and as Financial Secretary of Local Lodge D111

and

INDEPENDENT WORKERS OF NORTH AMERICA

Petitioners and Intervenor,

v.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Prior to April 1, 1984, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (hereinafter IBB) and the United Cement, Lime, Gypsum and Allied Workers International Union (hereinafter CWI) were two (2) separate international labor organizations. Effective April 1, 1984 these two (2) international unions merged; with the CWI becoming a division of the IBB.

Prior to April 1, 1984, the CWI and its affiliated Local Union 111 represented the employees of Gold Bond Building Products in Savannah, Georgia. As a result of the merger of the two (2) international unions, Local Union 111 became affiliated with the Cement Division of the IBB and was redesignated Local Lodge D111, but otherwise was unchanged. As an affiliate of the IBB, Local Lodge D111 was contractually bound to the provisions of the constitution of the IBB.

During the international convention of the IBB in August of 1986, a political squabble developed among certain candidates for IBB offices and their supporters.[1/] As with all political squabbles, one side lost. The losers of this political squabble then decided to form their own international labor organization calling it the Independent Workers of North America (hereinafter IWNA).

The IWNA proceeded to raid local lodges of the IBB. The vast majority of the members of the IWNA are former members of the IBB. Nevertheless, a majority of the former CWI locals remain with the IBB, and the Cement Division continues as a viable functioning appendage of the IBB.

The IWNA sought to represent the members of IBB Local Lodge D111 by filing a representation petition with the National Labor Relations Board (hereinafter NLRB). An NLRB election

---

[1/] For a more thorough explanation of this political battle, see, *Georgia Kaolin*, 287 N.L.R.B. No. 50 (1987).

was held and the IWNA was certified on January 16, 1987 as the collective bargaining representative of the employees of Gold Bond.

As a result of this NLRB election, there were less than ten (10) active members in IBB Local Lodge D111. Pursuant to certain contractual provisions in the IBB constitution, set forth more fully *infra*, the IBB revoked the charter of Local Lodge D111 and demanded the return of all assets to the IBB.[2/]

Local Lodge D111 and its officers refused to comply with this demand and suit was filed with the Superior Court of Chatham County Georgia by the IBB to enforce its contractual rights. That cause of action was properly removed by Defendants, pursuant to 28 U.S.C. § 1441 and 29 U.S.C. § 185, to the United States District Court for the Southern District of Georgia.

The IBB filed a Motion for Summary Judgment along with

[2/] It is interesting to note that the constitution of the former CWI contained a virtually identical provision, which stated:

Article 15

Section 7 — Disbanding of Local Unions

So long as at least seven (7) members thereof remain in good standing and retain employee status in a bargaining unit which constitutes the sole jurisdiction of the local union, a local union cannot be disbanded nor can such local union vote or otherwise decide to disband. Under no other circumstances may a local union be disbanded or dissolved without prior written consent of the International President. In the event a mill, plant or quarry, which constitutes the sole jurisdiction of a local union, is abandoned, the International President, with the consent of the International Executive Board may revoke the charter of said local union. All funds and other assets of a local union shall be the specific property of the local union, subject to all applicable provisions of the International Constitution and Bylaws, and under no conditions may local union funds and other assets be dissipated or allotted or divided among the members thereof, or turned over to any other organization or person.

(continued next page)

accompanying Memorandum, Statement of Facts, and Affidavits. The Statement of Facts and Affidavits were never controverted by Defendants, in fact, Defendants stipulated to most of these facts.

Defendants opposed Plaintiffs' Motion for Summary Judgment on the sole ground that certain provisions of the merger agreement between the IBB and the CWI conflicted with the surrender provisions of the IBB constitution. Defendants maintained that what has been referred to as the "retain clause" of the merger agreement allowed the IWNA to keep the assets of IBB Local Lodge D111. Both the District Court and the Circuit Court determined that the contractual language in question was not ambiguous as a matter of law and that the IBB was contractually entitled to the assets of former IBB Local Lodge D111.

Section 8 — International Union Control Over Local Union Property

In cases of suspension revocation of the charter, expulsion, lapsing, or disbanding of any local union for any cause or reason whatsoever, all the funds, property and assets of the local union shall forthwith revert to and become the property and assets of the International union. The International Secretary-Treasurer may authorize, in writing, a member of a nearby local union or another representative to take charge of and to remit to the International Union, all of the said funds, property and assets of the said local union. All such funds, property and assets of the said local union shall be held by the International Secretary-Treasurer, or his designated representative, and shall be held for a period of at least six months, during which said funds, property and assets may be used solely for the purpose of meeting the existing obligations of the said local union. If, within the period of time during which said funds, property and assets are held for the purpose of making said payments, application is made therefor by at least fifteen (15) members in good standing with the International Union in that locality, such local union shall be reestablished and the funds, property and assets shall belong to and become the property of the International Union to be commingled with the other property of the International Union.

REASONS WHY THE WRIT FOR CERTIORARI SHOULD NOT BE GRANTED

I. Certiorari Should Not Be Granted Because The Decision Below Does Not Create A Conflict Among The Circuits.

The decision in the present case by the Eleventh Circuit is not in conflict with the decision of the Seventh Circuit in *International Brotherhood of Boilermakers v. Local Lodge 714*, 845 F.2d 687 (7th Cir. 1988). In *International Brotherhood of Boilermakers v. Local Lodge 714* the IBB sought to enforce the trusteeship provisions of the IBB constitution. The IBB argued that local lodge 714 and it officers had violated the IBB constitution and that the IBB was entitled to injunctive relief to enforce the trusteeship placed on local lodge 714. The Seventh Circuit determined that if there were no longer ten (10) active members in local lodge 714 that the local lodge was automatically disbanded, and thus, there was no local lodge for the IBB to trustee. The Seventh Circuit also stated:

> The international's constitution may forbid disaffiliation, as we have seen. If so, then even if the prohibition is not enforceable by means of the trusteeship, because the prohibition of secession as such may not be a legitimate objective under section 302, it may still be enforceable as a matter of contract law.
>
> * * *
>
> The international union may appear to have a clear right to the return of its books and money, but that is not correct, because if the trusteeship is valid the trustee has the right to the books and money, while if the trusteeship is invalid the books and money presumably should be turned over to the international.
>
> * * *
>
> [P]rovided Local Lodge 714 did not disband before the trusteeship was voted and by disbanding perhaps place

> itself beyond the power of the international to impose a trusteeship; on these questions a remand is necessary.

845 F.2d at 695. Thus, the Seventh Circuit left open two (2) questions: (1) Did Local Lodge 714 fall below ten (10) members and thus automatically disband, and (2) Does the IBB constitution prohibit a local lodge from "disaffiliating"?

In the present case the IBB sought enforcement of the contractual surrender clause set forth in the IBB constitution, referred to by the Seventh Circuit in *International Brotherhood of Boilermakers v. Local Lodge 714*, 845 F.2d 687.[3/] The IBB argued that the membership in Local Lodge D111 fell below ten (10) members as the result of an NLRB election. The IBB further argued that the IBB constitution contractually obligated Local Lodge D111 to surrender all books, records, property,

---

[3/] The constitution of the IBB provides in relevant part:

Upon issuance of such Charter, such Local Lodge shall, subject to other applicable provisions of this Constitution and particularly Sections 3 and 4 of this Article, continue in existence while ten (10) or more of its members are employed under the jurisdiction of the International Brotherhood, subject to the approval of the Executive Council. If ten (10) or more members maintain membership in such Local Lodge and otherwise comply with the provisions of this Constitution, all books, records, properties, funds and assets (including trusts, trust funds or other trust properties held, operated or controlled by such Local Lodge) owned or held by such Local Lodge shall remain the property of such Local Lodge so long as the Charter is maintained.

Any Local Lodge having less than ten (10) active members shall be automatically disbanded and its Charter returned to the International Brotherhood, together with all books, records, properties, funds and assets (including trusts, trust funds or other trust properties held, operated or controlled by such Local Lodge) owned or held by such Local Lodge at the time of such disbanding, which shall become the property of the International Brotherhood. (Article V, Section 6).

(continued next page)

funds and assets of the local; the local having been disbanded pursuant to the IBB constitution. Citing the Seventh Circuit decision in *International Brotherhood of Boilermakers v. Local 714*, 845 F.2d 687, as support, the Eleventh Circuit found this contractual surrender clause enforceable. *International Brotherhood of Boilermakers v. Local Lodge D111*, 681 F. Supp. 1570, *aff'd.*, 858 F.2d 1559 (11th Cir. 1988).

Likewise, in *International Brotherhood of Boilermakers* v. D504, ____F.2d____, 130 L.R.R.M. (BNA) 2528 (3rd Cir. 1989), the IBB sought enforcement of this very same surrender clause. Citing, *International Brotherhood of Boilermakers v. Local Lodge D111*, 858 F.2d 1559, the Third Circuit also found this surrender clause enforceable. It is interesting to note that in *International Brotherhood of Boilermakers v. Local Lodge D522*, 815 F.2d 912, 917, n.8 (3rd Cir. 1987), the Meranze and Katz firm advocated enforcement of the very same provisions.

The funds and property of a subordinate body are trust funds for the benefit of its members and shall not be divided in any manner among the members of the subordinate body. Upon the surrender, forfeiture or revocation of its charter other than through consolidation, all funds belonging to each subordinate body shall be forwarded promptly to the International Secretary-Treasurer and all real estate and other property owned or held by such body shall be immediately transferred and conveyed by the proper legal instrument to the International Board of Trustees of the International Brotherhood. The International Brotherhood through its Board of Trustees shall be authorized to sell and liquidate such real estate and other property and the proceeds arising therefrom, after the payment of expenses incurred, shall be deposited with the other funds so forwarded to the International Secretary-Treasurer. All such funds shall revert to the General Fund of the International Brotherhood with proper record of the transfer maintained by the International Secretary-Treasurer. In the event such subordinate body should ever be rechartered at that location, the Executive Council is authorized to give approval to the transfer of an amount not to exceed fifty per cent (50%) of such funds from the General Fund to the credit of the rechartered subordinate body. (Article XXXVI, Section 2).

Neither the Eleventh Circuit nor the Third Circuit, addressed the issue before the Seventh Circuit — the enforceability of a trusteeship. All three (3) circuits are in accord on the only common issue — the enforceability of the surrender clauses contained in the IBB's constitution.

Apparently, Petitioners hinge their argument that there is a conflict among the circuits on certain language in *International Brotherhood of Boilermakers v. Local Lodge 714*, 845 F.2d 687. The Seventh Circuit stated:

> [t]he international's constitution is ambiguous on the right to disaffiliate. It contains no provision authorizing disaffiliation and contains a provision making 'secession or threaten secession' a ground for imposing a trusteeship, which could be taken either as an implied prohibition of disaffiliation or as recognition that disaffiliation will sometimes occur and authorization to do something about it.
>
> * * *
>
> Maybe Local Lodge 714 could not disaffiliate but if so many of its members quit that fewer than ten remained the lodge was automatically disbanded and its property reverted to the international.

845 F.2d at 692. The Seventh Circuit went on to conclude that because of the state of the record it could not make a determination as to whether or not the IBB constitution prohibited disaffiliation.

In the case *sub judice*, the Eleventh Circuit did not squarely rule on whether or not the IBB constitution prohibited disaffiliation of a local lodge. Here, the Eleventh Circuit found that Local Lodge D111 fell below ten (10) members and was disbanded as the result of an NLRB election. 858 F.2d 1564. The Eleventh Circuit went on to find the Local Lodge was contractually obligated to go on making per capita tax payments to the IBB until there were less than ten (10) members. 858 F.2d at 1568, *citing with favor, International Brotherhood of*

Boilermakers v. Local Lodge D296, 687 F. Supp. 469 (D. Ariz. 1988).

In *International Brotherhood of Boilermakers v. Local Lodge D238*, 678 F. Supp. 1575 (M.D. Ga. 1988), *aff'd.*, 865 F.2d 1228 (11th Cir. 1989), the Eleventh Circuit more squarely addressed one of the questions left unresolved by the Seventh Circuit in *International Brotherhood of Boilermakers v. Local Lodge 714* — whether or not a disaffiliation vote will result in the local lodge having less than ten (10) members. Citing, *International Brotherhood of Boilermakers v. Local Lodge 714*, with apparent favor, the Eleventh Circuit found that the locals in question had not disbanded by taking an internal disaffiliation vote, and that there were in fact more than ten (10) members. There, the Court found:

> the International Union presented evidence that the Local Lodges did not disband, and the Local Lodges failed to provide any evidence or testimony that their memberships fell below ten members.

865 F.2d 1235.

The Third Circuit in *International Brotherhood of Boilermakers v. Local Lodge D504* squarely addressed one of the other questions unresolved in *International Brotherhood of Boilermakers v. Local Lodge 714* — whether or not the IBB constitution prohibits disaffiliation. Based on a complete record, the Third Circuit was able to determine the IBB constitution did in fact prohibit disaffiliation. 130 L.R.R.M. (BNA) 2528, 2530, n.8. The Court went on to conclude:

> [t]he Boilermakers, even after the Locals' internal disaffiliation votes, remained the bargaining agent for the Locals until the National Labor Relations Board decertification.
>
> * * *
>
> Moreover, the Boilermakers provided support services to the Local Lodges until decertification. We hold that the

> per capita tax is due from the Local Lodges for each member until the date of decertification provided the member remained employed and remained a member of the Local Lodge.

130 L.R.R.M. 2532-33, *citing with favor, International Brotherhood of Boilermakers v. Local Lodge D31*, 694 F. Supp. 1203 (D. Md. 1988); and *International Brotherhood of Boilermakers v. Local Lodge D405*, 699 F. Supp. 749 (D. Ariz. 1988).

Petitioners also argue that the Eleventh Circuit's decision somehow conflicts with the Supreme Court's recent decision in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 57 U.S.L.W. 4283 (1989). *TWA v. Independent Federation of Flight Attendants*, stands for the proposition that an employer covered by the Railway Labor Act can hire permanent replacements for economic strikers, absent union animus, similar to an employer covered by the National Labor Relations Act. This decision has no bearing on the case *sub judice*.

II. Certiorari Should Not Be Granted Because The Decision Below Is Based Upon The Distinctive Contractual Arrangement Between The Parties.

The question presented to the Eleventh Circuit was very simple — whether or not the constitution of the IBB is consistent with the merger agreement and requires surrender of Local Lodge D111's assets to the IBB. The Eleventh Circuit found as a matter of law the contract language in question was not ambiguous. The Eleventh Circuit went on to find that the contract language unambiguously required surrender of Local Lodge D111's assets to the IBB. Such a factual based determination, particular to the parties, does not warrant review on a petition for certiorari. *Goodman v. Lukens Steel Company*, 482 U.S. 656, 107 S. Ct. 2617, 96 L. Ed.2d 572 (1987).

Petitioners apparently seek review on a number of more esoteric grounds, raised for the first time in their Petition for Writ of Certiorari. It would not be appropriate to grant certiorari on these issues not raised at the district court or circuit court level. *Springfield v. Kibbe*, 480 U.S. 257, 107 S. Ct. 1114, 94 L. Ed.2d 293 (1987); *Mishkin v. New York*, 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed.2d 56 (1966). Nor are the record facts such as to warrant review of the issues now argued by Petitioners in their Petition for Writ of Certiorari. *Gilbert v. California*, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed.2d 1178 (1967).

Petitioners raise for the first time in their Petition for Writ of Certiorari that the Eleventh Circuit's decision somehow interferes with the power of employees to select their own collective bargaining representative. Apparently, Petitioners rely on their factual assertion that "members of Local 111 engaged in valid and lawful disaffiliation proceedings designed individually and collectively to resign their memberships in the IBB." There was absolutely no record evidence before the court below to support such an argument. Moreover, Petitioners did not argue before the court below that enforcing the IBB constitution would somehow interfere with federal labor policy embodied in 29 U.S.C. § 157.

Petitioners raise for the first time in their Petition for Writ of Certiorari the argument that the Labor Management Reporting Disclosure Act does not permit a finding of entitlement to assets. Petitioners did not raise any argument before the court below that enforcement of the IBB constitution would somehow interfere with federal labor policy embodied in 29 U.S.C. § 401 or 29 U.S.C. § 501.

III. Certiorari Should Not Be Granted Because The Decision Below Comports With Federal Labor Policy.

The IBB constitution unambiguously requires Local Lodge D111 to surrender all books, properties, records, funds and

assets to the IBB. *International Brotherhood of Boilermakers v. Local Lodge 714*, 845 F.2d 687; *International Brotherhood of Boilermakers v. Local Lodge D504*, 130 L.R.R.M. (BNA) 2528; *International Brotherhood of Boilermakers v. Local Lodge D238*, 865 F.2d 1228; *International Brotherhood of Boilermakers v. Local Lodge D461*, 663 F. Supp. 1031 (M.D. Ga. 1987), *aff'd*, 835 F.2d 1439 (11th Cir. 1987); *International Brotherhood of Boilermakers v. Local Lodge D474*, 673 F. Supp. 199 (W.D. Tex. 1987); *International Brotherhood of Boilermakers v. Local Lodge D296*, 687 F. Supp. 469; and *International Brotherhood of Boilermakers v. Local Lodge D405*, 699 F. Supp. 749. The Eleventh Circuit specifically concluded that this unambiguous language required Local Lodge D111 to surrender all books, properties, funds and assets to the IBB. *International Brotherhood of Boilermakers v. Local Lodge D111*, 858 F.2d 1562-63.

A. Federal Labor Policy Favors Enforcement Of The IBB Constitution.

The surrender language set forth in the IBB constitution is not unusual, and is in fact, standard language for international unions.[4/] Local Lodge D111 contracted with the IBB when it became a chartered local of the IBB. The constitution of the IBB sets forth the terms of that contractual relationship, by which D111 agreed to abide. One of the terms of that contractual

---

[4/] See, e.g. *BRAC v. Orr*, 95 L.R.R.M. (BNA) 2701 (E.D. Tenn. 1977); *Local 1 v. International Brotherhood of Teamsters*, 461 F. Supp. 961 (E.D. Penn. 1978), *aff'd in part*, 614 F.2d 846 (3rd Cir. 1980); *Michigan Teamsters Joint Council v. Bufalino*, 626 F. Supp. 51 (E.D. Mich. 1985); *International Brotherhood of Teamsters v. United States*, 275 F.2d 610 (4th Cir. 1960), *cert. denied*, 362 U.S. 975; *Grain Millers Local v. Grain Millers International*, 59 L.R.R.M. (BNA) 3025 (Neb. D.C. 1965); *International Union v. Local 450*, 271 Minn. 181, 135 N.W.2d 697, 59 L.R.R.M. (BNA) 2288 (Minn. 1965); *Pizer v. Brown*, 133 Cal. App. 2d 367, 283 P.2d 1055, 36 L.R.R.M. (BNA) 2341 (Cal. Dist. Ct. App. 1955), *cert. denied*, 351 U.S. 982; *Fisher v. Behr*, 30 L.R.R.M. (BNA) 2116 (N.Y. Sup. Ct. 1952).

relation was that Local Lodge D111 is required to surrender all books, property, funds and assets to the IBB if it discontinues that contractual relation. Local Lodge D111 enjoyed the benefits of that bargain for over two (2) years and then refused to meet its obligations when it wished to end the contractual relation.

There is a specific grant of federal court jurisdiction for unions to enforce such contractual relations. 29 U.S.C. § 185; *Plumbers and Pipefitters v. Local 334*, 452 U.S. 615, 101 S. Ct. 2546, 69 L. Ed.2d 280 (1981). Moreover, Congress has specifically recognized the right of labor organizations to govern their own internal affairs, unless there is a direct conflict with federal labor policy. *Plumbers v. Local 334*, 452 U.S. 625-26. Concomitantly, a union's interpretation of the requirements of its own constitution will be respected by the Court and not overturned unless patently unreasonable. *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233, 242-43, 91 S. Ct. 609, 28 L. Ed.2d 10 (1971).

The IBB has interpreted its constitution to require a local lodge that is disbanded, to surrender all books, property, funds and assets to the IBB. That interpretation of the IBB constitution has been consistently applied since the incorporation of these provisions into the IBB constitution and has continued since the merger between the CWI and the IBB. That interpretation of the IBB constitution is not patently unreasonable and, accordingly, is due proper deference by the Court.

Federal labor policy considerations favor enforcement of such a provision.[5/] The most fundamental of Congressional labor goals is the preservation of industrial stability. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed.2d 972

[5/] Contrary to Petitioners' assertion, the vast majority of the courts that have addressed this issue have found similar provisions, to serve valid purposes consistent with federal labor policy, and thus, enforceable. See, generally, *Harker v. McKissock*, 7 N.J. 323, 81 A.2d 480, 28 L.R.R.M. (BNA) 2204 (N.J. 1951); *Walter Kidde v. United Electrical Radio &*

(continued next page)

(1957); *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed.2d 1409 (1960). Industrial stability is promoted through collective bargaining between employers and unions, which is in turn part of the federal labor policy. 29 U.S.C. § 151; *McVicker v. International Union of District 50 Allied and Technical Workers*,

---

Machine Workers, 7 N.J. 528, 82 A.2d 184, 28 L.R.R.M. (BNA) 2241 (N.J. 1951); *Bowman v. Moe*, 66 Wash. 2d 629, 404 P.2d 437, 60 L.R.R.M. (BNA) 2284 (Wash. 1965); *Bradley v. O'Hare*, 202 N.Y.S.2d 141, 46 L.R.R.M. (BNA) 2672 (N.Y. Sup. Ct. 1960); *NEA v. Dade County Class Room Teachers Association*, 407 F. Supp. 739 (S.D. Fla. 1974), *aff'd.*, 527 F.2d 1388 (5th Cir. 1976), *cert. denied*, 429 U.S. 827; *McVicker v. International Union of District 50*, 327 F. Supp. 296 (N.D. Ohio 1971); *Sawyers v. Grand Lodge, International Association of Machinists*, 279 F. Supp. 747 (E.D. Mo. 1967).

Some Courts have, nevertheless, created a limited exception to this rule where labor organizations have been substantially infiltrated by organized crime or communist influences, resulting in a schism in the international union. See, e.g. *Bradley v. O'Hare*, 202 N.Y.S.2d 141. However, the National Labor Relations Board itself has already ruled no such disruption exists in the International Brotherhood of Boilermakers. See, *Georgia Kaolin, Inc.*, 287 N.L.R.B. No. 50 (1987), *cited with favor, International Brotherhood of Boilermakers v. Local Lodge D238*, 681 F. Supp. 1570 (M.D. Ga. 1988), *aff'd*, 865 F.2d 1228 (11th Cir. 1989).

The cases cited by Petitioners do not lend support to their argument. The question of proper ownership of the assets pursuant to contractual obligations of the local is not addressed in *NLRB v. Hershey's Chocolate Corporation*, 297 F.2d 286 (3rd Cir. 1961). The decisions of the NLRB in *Prudential Insurance Company*, 106 N.L.R.B. 237 (1953) and *Louisville Railroad*, 90 N.L.R.B. 678 (1950), deal with whether or not the NLRB should hold a representation election. *Alvino v. Carraccio*, 400 Pa. 477, 162 A.2d 358, 46 L.R.R.M. (BNA) 2541 (Pa. 1960), is another case carving out a limited exception where there is widespread corruption at the international union. Finally, *Wells v. Waukesha County Marine Bank*, 135 Wis. 2d 519, 401 N.W.2d 18, 124 L.R.R.M. (BNA) 2735 (Wis. Ct. App. 1986), is founded on a state court's interpretation of a state statute. Morever, the reasoning of *Wells v. Waukesha*, interpreting federal law, is faulty and principles of voluntary unionism alluded to in that case are much narrower than the court perceived.

327 F. Supp. 296. The destruction of labor unions impairs the collective bargaining process and should be avoided if possible. *Electrical Workers v. Foust*, 442 U.S. 42, 99 S. Ct. 2121, 60 L. Ed.2d 698 (1979); *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed.2d 842 (1967).

If local labor unions are allowed to take the benefits of affiliation with international unions, without being bound by the international's constitution, international unions will be unable to protect the limited funds that they can accumulate. International unions could spend large amounts of money organizing and representing employees at a particular location, in the expectation that those employees will become valuable members of the international union as a whole. Allowing local unions to withdraw after they receive these services, despite their contractual obligations, defeats the very purpose of an international labor union — collective action to increase economic power. Enforcement of a constitutional provision that requires the local to surrender its assets upon disaffiliation encourages participation by the local union in the international union. Healthy and stable international unions in turn promote the national labor policy of collective bargaining and industrial stability.

The Eleventh Circuit recognized that this policy consideration favored enforcement of the IBB constitution. *International Brotherhood of Boilermakers v. Local Lodge D238*, 865 F.2d 1237. As the Seventh Circuit stated:

> [a]n organization might conceivably lack minimum stability if each of its cells were free to depart at a drop of a hat, and if so, it would not comport with the procompetitive policies of Landrum-Griffin to forbid unions to take any measures at all to impede secession.

845 F.2d at 694.

Congress has also found that the preservation of ethical standards in the administration of labor organizations is an

important federal labor policy. 29 U.S.C. § 401. Thus, Congress enacted 29 U.S.C. § 501(a), which states, *inter alia*:

> It is, therefore, the duty of each person, taking into account the special problems and functions of a labor organization, to hold its money and property *solely for the benefit of the organization* and its members and to manage, invest, and expend the same *in accordance with its constitution and bylaws* and any resolutions of the governing bodies adopted thereunder, to *refrain from dealing with such organization as an adverse party or in behalf of an adverse party*.

(Emphasis added).

The IBB constitution echoes these principles and creates an enforceable contractual obligation very similar to these statutory obligations. Thus, the IBB constitution provides the funds of a subordinate body are to be used only for the subordinate body in accordance with the IBB constitution, and if the subordinate body leaves the IBB, the funds must be surrendered to the IBB. IBB constitution Article XXXVI, Section 1 and 2. Likewise, that IBB constitution provides that no member in exercising his or her rights as a member shall evade or avoid his or her responsibilities to the organization as an institution or advocate any conduct that would interfere with the organization (IBB constitution Article XXIX, Section 2), and prohibits a member from advocating conduct detrimental to the interest of the IBB or its subordinate bodies. (IBB constitution Article XVII, Section 1(e) and (1)).

Contrary to the Petitioners' position, not only do the officers of Local Lodge D111 have duties toward the membership, but they have duties toward Local D111 and the IBB as entities.[6/]

[6/] Petitioners boldly state that there is no evidence of a violation of 29 U.S.C. § 501. There was ample evidence before the Eleventh Circuit that Local Lodge funds were dissipated in violation of the IBB constitution. Moreover, there was no evidence before the Eleventh Circuit that the Local Lodge membership somehow approved of this fraud.

These officers must hold the property of the IBB for the benefit of the IBB as an entity. Congress specifically left the manner in which this was to be carried out to the internal operation of unions and their governing rules. Congress also specifically admonished union officers not to deal with the union entity as an adverse party.

As Petitioners note, the IBB constitution provides that local lodge funds are "trust funds for the benefit of its members." Yet, the Petitioners fail to note that the IBB constitution also provides "[t]he funds of any subordinate body shall be used only for the purpose of said body" and "shall not be divided in any manner among the members of the subordinate body." IBB constitution Article XXXVI, Section 1 and 2. The IBB constitution goes on to state that those assets revert to the IBB when the local lodge is no longer a subordinate body of the IBB.

Petitioners appear to advocate that local union officers can spend local union money in any fashion they please, despite contractual restrictions, as long as a majority of the membership votes in favor of the expenditure. In this instance, those members ostensibly voted to spend money in direct contravention to the rules they agreed upon and in conflict with the union entity itself. The logical extreme of this argument is that the local union officers could use local union money to finance a vacation to Bermuda as long as a majority of the membership voted in favor of the expenditure. This is the very type of abuse that 29 U.S.C. § 501 was designed to prohibit. The IBB seeks to prevent such abuses in this case by enforcing its contractual rights. By enforcing these contractual rights the Court would in turn be promoting federal labor policy as set forth in 29 U.S.C. § 501. *International Brotherhood of Boilermakers v. Local Lodge D296*, 687 F. Supp. 469; and *International Brotherhood of Boilermakers v. Local Lodge D111*, 681 F. Supp. at 1575, *aff'd.*, 858 F.2d 1559.

B. Enforcement Of The IBB Constitution Does Not Interfere With Employee Rights To Select Their Own Collective Bargaining Representative.

This Court has previously found that the relationship between a union and its members is contractual in nature, unless the contract impinges on some policy of federal labor law. *Scofield v. NLRB*, 394 U.S. 423, 89 S. Ct. 1154, 22 L. Ed.2d 385 (1969); *NLRB v. Boeing Company*, 412 U.S. 67, 93 S. Ct. 1952, 36 L. Ed.2d 752 (1973). Thus, unions remain free to promulgated and enforce rules against members who voluntarily submit themselves to such enforcement by agreeing to assume full membership, even if the rule and its enforcement might otherwise restrain or coerce the exercise of rights under 29 U.S.C. § 157; *Pattern Makers' League v. NLRB*, 473 U.S. 95, 105 S. Ct. 3064, 87 L. Ed.2d 68 (1985); *NLRB v. Allis-Chalmers*, 388 U.S. 175, 87 S. Ct. 2001, 18 L. Ed.2d 1123 (1967).

It is correct that a union member must be free to resign his membership in the union, thereby, escaping any future application of the rule to subsequent conduct. *Pattern Makers' League v. NLRB*, 473 U.S. 95. Nevertheless, *Pattern Makers' League* does not stand for the proposition that a union member who resigns may lay claim to all or a portion of the union treasury. To the contrary, it does not impinge on federal labor law to require a member to pay all contractual financial obligations upon resignation. *NLRB v. Granite State Joint Board*, 409 U.S. 213, 93 S. Ct. 385, 34 L. Ed.2d 422 (1972). Thus, the Court stated in *Granite State Joint Board*:

> We have, therefore, only to apply the law which normally is reflected in our free institutions — the right of the individual to join or resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group which he was associated.

409 U.S. at 216.

The IBB has placed no restriction whatsoever on the right of the members of Local Lodge D111 to resign from union membership. The members of Local Lodge D111 were free to resign at any time they chose. There is no evidence present in this case to indicate any members of Local Lodge D111 resigned from union membership prior to the NLRB election.

The IBB constitution does indicate if enough members resign, so that the local lodge falls below ten (10) members, that the local lodge forfeits its charter in the IBB. The IBB constitution also states that if the local lodge loses its IBB charter for this or any other reason, that local lodge assets are surrendered to the IBB.

Congress has placed no restriction on an international union's ability to grant or revoke a local union charter. In fact, this Court has specifically recognized the right of international unions to govern their own internal affairs, unless there is a direct conflict with federal law. *NLRB v. Boeing*, 412 U.S. 67; and *Plumbers v. Local 334*, 452 U.S. 615, n. 15.

While there is a specific right for union members to resign from a union, there is no such statutory right for local unions to resign or "disaffiliate" from international unions. In fact, this Court has previously made it very clear that no federal statute regulates union decision making over matters such as affiliation. *NLRB v. Financial Institution Employees, Local 1182*, 475 U.S. 192, 106 S. Ct. 1007, 89 L. Ed.2d 151 (1986); *United Steelworkers v. Sadlowski*, 457 U.S. 102, 102 S. Ct. 2339, 72 L. Ed.2d 707 (1982).

To the extent those internal union affairs are governed by some sort of contractual relation, Congress granted jurisdiction to federal courts, under 29 U.S.C. § 185, to resolve differences concerning those contractual relations. Since there is no federal labor policy that is affected by a rule preventing local union affiliation, the courts have generally found such a rule contractually enforceable. *NEA v. Dade County Class Room Teachers Association*, 407 F. Supp. 739; *McVicker v.*

International Union of District 50, 327 F. Supp. 296; *Sawyers v. Grand Lodge International Association of Machinists*, 279 F. Supp. 747; *International Brotherhood of Boilermakers v. Local Lodge D474*, 673 F. Supp. 199; *International Brotherhood of Boilermakers v. Local Lodge D238*, 865 F.2d 1228.

Not only does enforcement of the IBB constitution not interfere with free employee selection of their collective bargaining representative, it actually promotes such free choice. The IWNA apparently pilfered the funds of Boilermakers Local Lodge D111 months before the NLRB election. Petitioners assert without resort to record evidence that this was done as the result of some sort of internal union disaffiliation vote.

There was no evidence before the court below that any vote ever took place. There was no evidence before the court below that there was adequate notice to the members of the purported vote. There was also no evidence that there was any notice to the IBB of the purported vote.[7/] There was no evidence that the purported vote authorized the misuse of Local Lodge funds. There was also no evidence before the court below that the members were offered an opportunity to freely discuss the issues and voted in a noncoercive atmosphere. In short, there was no evidence that the minimal due process requirements were observed.

If any party interfered with the selection of the collective bargaining representative it was the IWNA. By the time of the NLRB election, the employees were faced with a *fait accompli*. The employees had two (2) choices during the NLRB election: (1) vote for a IBB Local Lodge, whose treasury had been pilfered; or (2) vote for the IWNA, which was in possession of the pilfered funds. The pilferage of the IBB books, records,

---

[7/] Although the IBB was generally aware that the IWNA was raiding its locals, the IBB did not become aware of the purported vote at Local Lodge D111 until Petitioners attorneys asserted a vote took place in its briefs to the court below.

property and funds can only be viewed as an interference with employee freedom of choice. *Kearney & Trecker v. NLRB*, 210 F.2d 852 (7th Cir. 1954), *cert. denied*, 348 U.S. 824.

C. The IBB Constitution Does Not Require Members To Continue Paying Per Capita Tax After Resignation.

The IBB constitution places no restriction on the right to resign from membership in Local Lodge D111. Nor does the IBB's constitution require former members to continuing paying dues after resignation.

The IBB constitution does require Local Lodge D111 to continue making per capita tax/division fund payments to the IBB, for each member that it does have. The Eleventh Circuit found that Local Lodge D111 attempted to disaffiliate in September of 1986, but that attempted disaffiliation was ineffectual. 858 F.2d 1559. See, also, *International Brotherhood of Boilermakers v. Local Lodge D238*, 865 F.2d 1418. The Eleventh Circuit went on to find that Local Lodge D111 was disbanded by the IBB in February of 1987. Thus, the Eleventh Circuit found that the contractual obligation to make per capita tax/division fund payments continued to inure until disbandment.

As the Eleventh Circuit found in *International Brotherhood of Boilermakers v. Local Lodge D111*, there was no factual dispute as to how many members D111 had or how much in per capita tax/division fund payments were due. Thus, there was no issue before the Eleventh Circuit of requiring individuals who had resigned to pay dues.

The Third Circuit expanded on this view in *International Brotherhood of Boilermakers v. Local Lodge D504*, when it held:

> that the per capita tax is due from the Local Lodges for each member until the date of decertification provided the

member remained employed and *remained a member of the Local Lodge*.

(Emphasis added). 130 L.R.R.M. (BNA) 2533.

Accordingly, Local Lodge D111 continued to have a contractual obligation to make per capita tax/division fund payments to the IBB, for each *member*, until disbandment. Since a vote to disaffiliate does not constitute resignation, Local Lodge D111 remained obligated to make payment to the IBB until disbandment.

CONCLUSION

For all foregoing reasons, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

MICHAEL J. STAPP
(Counsel of Record)
Blake & Uhlig, P.A.
475 New Brotherhood Building
753 State Avenue
Kansas City, Kansas 66101
ATTORNEYS FOR RESPONDENT

April, 1989